85-1253

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

EAGLE-PICHER INDUSTRIES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a shipyard worker "engaged in maritime employment" under the federal Longshoremen's and Harbor Workers' Compensation Act ("LHWCA") must independently satisfy the "nexus" requirement established for general admiralty jurisdiction in *Executive Jet Aviation Co. v. City of Cleveland*, 409 U.S. 249 (1972), in order to sue a negligent vessel owner under Section 5(b) of the LHWCA, 33 U.S.C. § 905(b) (1982).

PARTIES TO THE PROCEEDING BELOW

The following parties participated in the proceeding before the United States Court of Appeals for the First Circuit:

Appellant: United States of America (Respondent herein); and

Appellees: Eagle-Picher Industries, Inc. (Petitioner herein),
H.K. Porter Co., Inc.,
Owens-Illinois, Inc.,
Pittsburgh-Corning Corporation, and
Raymark Industries, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

LIST OF APPENDICES *

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* Each of the appendices listed herein is reproduced in the separately bound Appendix to this petition, pursuant to Rule 21.1(k) of the Rules of this Court.

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DECISION BELOW

Review is hereby sought of a decision of the United States Court of Appeals for the First Circuit reported at 772 F.2d 1023.[1]

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[1] *In re All Maine Asbestos Litigation (PNS Cases)*, 772 F.2d 1023 (1st Cir. 1985), *aff'g in part, vacating in part* 589 F. Supp. 1571 (D. Me. 1984).

The opinion of the court of appeals is reproduced as Appendix A to this petition; the opinion of the district court is reproduced as Appendix B hereto. A prior opinion of the district court in this case, reported at 581 F. Supp. 963, is reproduced as Appendix C hereto. And the prior decision of the court of appeals in *Drake v. Raymark Industries, Inc.*, 772 F.2d 1007 (1st Cir. 1985)—upon which the decision below was based—is reproduced as Appendix D.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1985. Appellee Raymark Industries, Inc.'s timely petition for rehearing and suggestion for rehearing *en banc* were denied by the court of appeals by order of October 30, 1985. A copy of that order is reproduced as Appendix E to this petition. *See* App. at 90a-91a.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTE INVOLVED

The statutory provision involved in this proceeding is Section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 905(b) (1982).[2] The text of that provision is reproduced as Appendix F to this petition. *See* App. at 92a.

Also relevant here are the provisions of Sections 2(3) and 3(a) of the LHWCA, 33 U.S.C. §§ 902(3) and 903 (a) (1982). The texts of those provisions are reproduced as Appendix G to this petition. *See* App. at 93a.

STATEMENT OF THE CASE

I. Proceedings in the District Court

This litigation arises out of civil actions initiated in the United States District Court for the District of Maine by approximately 100 current and former employees of the Portsmouth Naval Shipyard (or their survivors) against several corporations formerly engaged in the manufacture and sale of asbestos-containing insulation products. In each of those actions, the plaintiff claimed to have suffered personal injury as the result

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[2] Section 5(b) of the LHWCA was amended prospectively in 1984. *See* Public Law No. 98-426, § 5(a)(1), 98 Stat. 1641. That amendment has no application to the instant litigation. *See id.*, § 28(c), 98 Stat. 1653. *See generally* note 20 *infra*.

of having been exposed, during the course of his shipyard employment, to asbestos and asbestos-containing products manufactured by one or more of the corporate defendants therein.

During the course of those proceedings, several of the defendant manufacturers—including petitioner Eagle-Picher Industries, Inc. ("Eagle-Picher")—filed third-party complaints against the United States, seeking contribution and/or noncontractual indemnification, on the the basis of the pervasive and dominant role played by the federal government in occasioning the plaintiffs' allegedly disease-causing exposure to asbestos and those wrongful and negligent acts and omissions of the federal government which were the proximate cause of the plaintiffs' injuries.

Following discussions and negotiations among the various parties, Eagle-Picher and other of the defendant manufacturers agreed to file a single "Model Third-Party Complaint," setting forth the claims of the manufacturers against the United States in all of the Portsmouth Naval Shipyard cases.[3] On or about August 1, 1983, the third-party defendant United States moved to dismiss (or, alternatively, for summary judgment on) the manufacturers' third-party complaint. The matter was fully briefed and argued before the Honorable Edward D. Gignoux, United States Senior District Judge.

By memorandum opinion and order dated February 23, 1984, Judge Gignoux granted the Government's motion with respect to eight of the nine counts set forth in

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[3] A copy of that "Model Third-Party Complaint" is reproduced as Appendix H to this petition. *See* App. at 94a-107a.

A separate "Model Third-Party Complaint" was filed in connection with all similar cases arising out of the Bath Iron Works, a private shipyard. *See In re All Maine Asbestos Litigation*, 581 F. Supp. 963, 968 (D. Me. 1984) [App. at 27a, 29a-31a]. *See generally* note 4 *infra*.

the manufacturers' model complaint; he reserved judgment on Count VI of that complaint, wherein the manufacturers seek contribution and/or noncontractual indemnity from the United States on the basis of the wrongful and negligent acts and omissions of the federal government in its role as the owner of the naval vessels constructed and repaired at the Portsmouth Naval Shipyard. *In re All Maine Asbestos Litigation*, 581 F. Supp. 963 (D. Me. 1984) [App. at 27a-58a].[4]

On July 6, 1984, Judge Gignoux denied the Government's motion to dismiss Count VI of the manufacturers' third-party complaint. *See In re All Maine Asbestos Litigation (PNS Cases)*, 589 F. Supp. 1571 (D. Me. 1984) [App. at 18a-26a]. Thereafter, at the Government's request, he certified that decision for interlocutory appeal;[5] the Government petitioned the court of appeals for permission to appeal from Judge Gignoux's interlocutory

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[4] The other counts of the manufacturers' third-party complaint set forth causes of action against the United States (i) as the seller of raw asbestos and asbestos-containing products (Counts I, II, III); (ii) as the promulgator of specifications requiring the use of asbestos in insulation products used at the Portsmouth Naval Shipyard (Counts IV, V); (iii) as the employer of the injured shipyard workers (Counts IV, V, VII, VIII); and (iv) all of the above, under the district court's general admiralty jurisdiction (Count IX). *See* 581 F. Supp. at 968, 980 [App. at 29a, 55a-56a]. Final judgment has yet to be entered with respect to the dismissal of those claims, and Eagle-Picher does not concede the propriety of such dismissal.

Judge Gignoux's treatment of the corresponding claims of the manufacturers against the United States in the related private-shipyard litigation (*see* note 3 *supra*) was identical to his actions here. Dismissing eight of the manufacturers' nine claims, he upheld the manufacturers' FTCA claim against the United States as the owner of those vessels constructed and repaired at the Bath Iron Works. *See* 581 F. Supp. at 975-77 [App. at 44a-50a]. The United States has not appealed from that ruling.

[5] That order is reproduced as Appendix I to this petition. *See* App. at 108a-109a.

order; and the court of appeals granted that petition on September 20, 1984.[6]

II. Proceedings in the Court of Appeals

On appeal, the parties were in agreement as to the following basic premises:

1. The Federal Tort Claims Act subjects the United States to liability "in the same manner and to the same extent as a private individual under like circumstances," [7] "in accordance with the law of the place where the act or omission occurred." [8]

2. "[I]n determining whether the United States is subject to liability under the FTCA for contribution or indemnity on a theory of vessel-owner negligence, [the court] must look to the law that a Maine court would apply in analogous circumstances." [9]

3. "Here, the analogous 'private person' [is] a private shipyard [in Maine] that functioned as a 'vessel owner.'" [10]

4. "Section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 905(b), confers a cause of action upon a person covered under the LHWCA [for injuries] caused by the negligence of a vessel." [11]

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[6] That order is reproduced as Appendix J to this petition. *See* App. at 110a-111a.

[7] 28 U.S.C. § 2674 (1982).

[8] 28 U.S.C. § 1346(b) (1982).

[9] *In re All Maine Asbestos Litigation (PNS Cases), supra,* 589 F. Supp. at 1574 [App. at 22a-23a].

[10] Brief for the United States of America, at 7, *In re All Maine Asbestos Litigation (PNS Cases),* No. 84-1779 (1st Cir.) (filed Nov. 14, 1984) (hereinafter cited as "Government First Circuit Brief"). *See also* 589 F. Supp. at 1574 [App. at 23a].

[11] Government First Circuit Brief, *supra* note 10, at 7.

5. A private shipyard/vessel-owner in Maine *may* be held liable for contribution and indemnity for losses incurred by a third-party as the result of injuries to the shipyard/vessel-owner's employees caused by the shipyard/vessel-owner's negligence in its capacity as a vessel owner.[12]

Eagle-Picher argued before the court of appeals that these uncontested premises logically—and necessarily—compel the conclusion that the United States *may* be held liable here to Eagle-Picher as the result of injuries to federal shipyard workers caused by the Government's wrongful and negligent conduct in its capacity as vessel owner.[13]

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[12] *See id.* at 9-10:

> Maritime common law permits contribution in non-collision cases . . . where the third-party defendant [*i.e.*, the private shipyard/vessel-owner] is liable in tort to the underlying plaintiff . . . .
>
> . . . . [In] *Jones and Laughlin Steel Corp. v. Pfeifer*, 103 S.Ct. 2541, 2547 n.6 (1983), . . . the Supreme Court ruled that a *private* employee/vessel owner could be held liable in tort to its employees if negligent *qua* vessel owner. . . .

[13] Three district courts—the district court below, the United States District Court for the District of Hawaii, and the United States District Court for the Eastern District of Pennsylvania—had previously addressed the amenability of the United States to third-party FTCA claims in the circumstances presented here. In *every* case, the court had upheld an *identical* third-party claim against the Government in its capacity as vessel owner; and, in *every* case, the *same* Government motion for dismissal (or, alternatively, for summary judgment) had been denied. *See In re All Asbestos Cases*, 603 F. Supp. 599, 603-06, 612-13 (D. Hawaii 1984); *Colombo v. Johns-Manville Corp.*, 601 F. Supp. 1119, 1132-39 (E.D. Pa. 1984); *In re All Maine Asbestos Litigation (PNS Cases)*, *supra*, 589 F. Supp. at 1575-76. *See also Johns-Manville Sales Corp. v. United States*, No. C 81-4561 RFP (N.D. Cal. Aug. 21, 1985) (Order re Motion to Dismiss) (slip op., at 19-23, 27) (motion for reconsideration pending). Judge Peckham's slip opinion in the *Johns-Manville* case is reproduced as Appendix K to this petition. *See* App. at 112a, 127a-130a, 132a.

The Government, on the other hand, argued that—despite the FTCA's mandate that the United States be held liable "in the same manner and to the same extent as a private individual under like circumstances"—and despite its concession that such a private shipyard/vessel-owner *may* be held liable under the LHWCA in the circumstances presented here—the United States may not be held liable here because the injured plaintiffs were covered by the Federal Employees' Compensation Act ("FECA"), 5 U.S.C. §§ 8101-8193 (1982).[14]

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[14] *See, e.g.*, Government First Circuit Brief, *supra* note 10, at 9-10, *citing Johansen v. United States*, 343 U.S. 427 (1952), *and Patterson v. United States*, 359 U.S. 495 (1959).

Three district courts had previously rejected the same argument:

> The relevant inquiry under the FTCA must be . . . whether a *private* shipyard employer in Maine would be subject to liability to its employees in its capacity as a vessel owner. Such a private shipyard would not be protected by the *Johansen/Patterson* doctrine *because the shipyard would not be covered by the FECA. Indeed, by reason of section 905(b) of the LHWCA, a private shipyard employer-vessel owner would be subject to liability to its employees for negligence in its capacity as a vessel owner. Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 103 S.Ct. 2541, 51 U.S.L.W. 4795 (1983). The argument of the United States that defendants' third-party claims for contribution are barred by maritime law because there can be no joint tortfeasor liability between it and defendants therefore fails.

In re All Maine Asbestos Litigation, supra, 589 F. Supp. at 1576 [App. at 25a-26a] (emphasis added).

> Section 5(b) of LHWCA permits *direct* actions against an employer *qua* vessel owner. [*Jones & Laughlin Steel Corp. v.*] *Pfeifer, supra*, 103 S.Ct. at 2548.[10]

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[10] It makes no difference that FECA would preclude Mr. Colombo from suing the United States directly. Pittsburgh-Corning's sixth claim is brought under FTCA, so that the liability of the United States is the same as that of a private shipyard employer. Such an entity would be subject to direct

The court of appeals heard oral argument on January 9, 1985, and took the case under advisement.

III. The *Drake* Decision

On August 27, 1985, the Court of Appeals for the First Circuit rendered a decision in another case (to which neither the United States nor Eagle-Picher was a party), in which it announced a new, absolutely unprecedented and, Eagle-Picher submits, entirely unfounded interpretation of Section 5(b) of the LHWCA, 33 U.S.C. § 905(b). What had been an undisputed, common ground of agreement in *this* case—*viz.*, the susceptibility of a private shipyard/vessel-owner to suit under 33 U.S.C. § 905(b) in the circumstances presented here—was suddenly and unexpectedly thrown into dispute. Specifically, in *Drake v. Raymark Industries, Inc.*, 772 F.2d 1007, 1011-19 (1st Cir. 1985) [App. at 59a, 64a-81a], the court of appeals ruled that:

> (i) Whether a private shipyard/vessel-owner may be held liable under Section 905(b) depends upon

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suit by its employee under section 5b as interpreted by the Supreme Court in *Pfeifer*.

Colombo v. Johns-Manville Corp., 601 F. Supp. at 1137 & n.10 (emphasis in original). And:

> [U]nder the Federal Tort Claims Act the United States' liability is to be judged by the same standard applicable to a private person; therefore . . . FECA's exclusivity provision could not act as a bar [to the manufacturers' third-party claims]. . . .
>
> * * * *
>
> Because, if the United States had been a private employer, plaintiffs could have sued the United States for negligence as a vessel owner under *Jones & Laughlin*, these "*Scindia* claims" are also available to third-party plaintiffs as claims for contribution.

In re All Asbestos Cases, Civil No. 79-0382 (D. Hawaii Nov. 20, 1984) (Order on Motion for Reconsideration, at 2). The order denying the Government's motion for reconsideration in the Hawaii decision is reproduced as Appendix L to this petition. *See* App. at 134a-135a.

whether the injured LHWCA worker can—independently of his maritime employment—satisfy the "nexus" criterion for admiralty jurisdiction articulated by this Court in *Executive Jet Aviation Co. v. City of Cleveland*, 409 U.S. 249 (1972);[15]

(ii) The federal vessel-owner claim of an LHWCA worker in circumstances identical to those presented here (which the court erroneously equated with the product-liability claim of such a worker against a land-based asbestos manufacturer[16]) does not inde-

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[15] Prior to 1972, any tort occurring, however fortuitously, upon navigable waters was deemed to fall within the general admiralty jurisdiction of the federal courts. *See, e.g., Victory Carriers, Inc. v. Law*, 404 U.S. 202, 205 & n. 2 (1971); *The Plymouth*, 70 U.S. [3 Wall.] 20, 35-36 (1866). Frequently, "perverse and casuistic borderline situations" arose in which an injured party's "wholly fortuitous" location upon navigable waters resulted arbitrarily and inappropriately in the automatic application of maritime law. *See Executive Jet Aviation Co. v. City of Cleveland, supra*, 409 U.S. at 255, 267-68. In *Executive Jet*, this Court squarely confronted such problems, and ruled that the invocation of the courts' general maritime jurisdiction and the application of federal maritime law should not henceforth be determined by reference to a monolithic "locality test." Rather, it said, in the absence of a statute to the contrary (*id.* at 274 & n. 26), a tort shall be deemed "maritime" in nature only if it (i) occurs upon navigable waters ("situs") *and* (ii) bears some "significant relationship to traditional maritime activity" ("nexus"). *Id.* at 268.

[16] Perhaps the most clearly mistaken aspect of the court's opinion in *Drake* (and in this case) was its myopic failure to distinguish between a maritime worker's Section 905(b) negligence action against a vessel owner for breaches of duties of care imposed by federal law (as articulated by this Court in *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156 (1981)) on the one hand, and such a worker's product-liability claim against a land-based manufacturer of putatively unsafe products to which he was fortuitously exposed while on navigable waters on the other. *See, e.g.*, 772 F.2d 1016 [App. at 75a] ("[S]uffice it to say that the facts here are essentially the same as in the other [underlying asbestos] cases cited which found that lack of sufficient relationship to traditional admiralty concerns negated the application of admiralty law

pendently satisfy the jurisdictional "nexus" criterion of *Executive Jet*; and:

(iii) Such a vessel-owner claim may therefore not be asserted under 33 U.S.C. § 905(b), and thus no

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[to the product-liability claims of shipyard workers against asbestos-product manufacturers].").

The court of appeals failed, in other words, to distinguish between the state-law personal-injury lawsuit which the underlying plaintiff *did bring* against the several land-based asbestos-product manufacturers, and the federal maritime claim which such a worker *could have brought* under Section 905(b) against a negligent private vessel owner. The two types of actions are *not* the same—they involve entirely distinct and dissimilar torts; they are founded in different bodies of law; they are based upon different facts; and they involve entirely different parties alleged to have violated entirely different duties.

These obvious distinctions were clearly recognized by the Court of Appeals for the Fifth Circuit in *Hall v. Hvide Hull No. 3*, 746 F.2d 294 (5th Cir. 1984), *cert. denied sub nom. Avondale Shipyards v. Rosetti*, 54 U.S.L.W. 3212 (U.S. Oct. 7, 1985). There, too, an attempt was made by an allegedly negligent vessel owner to equate the Section 905(b) claim against it with the product-liability actions so commonly asserted against asbestos-product manufacturers. Not surprisingly, the court of appeals unequivocally rejected that effort, carefully and thoroughly distinguishing the very same asbestos cases upon which the First Circuit relied in *Drake*. Among other things, the court noted:

> (i) "[N]one [of the underlying asbestos cases] involves . . . a § 905(b) claim against a vessel or its owner";
>
> (ii) "[None involves] a question about the scope of the federal court's admiralty jurisdiction under the Longshoremen's Act";
>
> (iii) "All are based on the alleged liability of a [land-based] manufacturer for injuries sustained in connection with the manufacturers' asbestos products"; and
>
> (iv) "Even more important, perhaps, all involve the delicate question whether the federal interest in an amphibious worker's personal injury claims is sufficiently strong to justify federal courts supplanting [ordinarily applicable] state law with the federal common law of admiralty. . . . This question is not relevant to the present facts."

746 F.2d at 302 n.16.

> basis would exist for the assertion of a third-party claim for contribution or indemnification against such a vessel owner.

That decision was shortly to govern the court's disposition of the instant case.

IV. The Decision Below

On September 18, 1985, the court of appeals extended its holding in *Drake* to the instant litigation, ruling (i) that, under its *Drake* decision, a private vessel-owner may not be sued under 33 U.S.C. § 905(b) in the circumstances presented here and (ii) that the United States may therefore not be sued in such circumstances under the FTCA. *See In re All Maine Asbestos Litigation (PNS Cases)*, *supra*, 772 F.2d at 1029-30 [App. at 11a-14a].

REASONS FOR GRANTING THE WRIT

I. Introduction: The 1972 LHWCA Amendments

Congress amended the LHWCA in 1972 "[i]n order to provide adequate income replacement for disabled workers covered under this law [through] a substantial increase in benefits." H.R. Rep. No. 1441, 92d Cong., 2d Sess. 1 (1972), *reprinted in* 1972 *U.S. Code Cong. & Admin. News* 4698-99. In addition to increasing worker benefits, however, Congress also addressed what it perceived to be two significant substantive problems with the then-existing law. Its resolution of those problems involved the enactment of those provisions which lie at the heart of the instant controversy.

First, Congress expressed concern—similar to the concern later expressed by this Court in *Executive Jet*—that coverage under the Act was being determined solely (and often arbitrarily) by whether an injury had occurred "upon the navigable waters of the United States." *Id.* at 10, 1972 *U.S. Code Cong. & Admin. News*, at 4707. In other words, coverage under the LHWCA—like the

general admiralty jurisdiction of the federal courts—was being determined solely by the accident of "locality" or "situs." Congress undertook to remedy that situation—in much the same way as this Court later undertook in *Executive Jet* to deal with the same problem in the general jurisdictional context—by amending the Act's definition of "employee":

> Subsection (a) amends the definition of the term "employee" contained in section 2(3) of the Act. The present definition merely excludes from the definition of "employee" a master or member of a crew, or any person engaged by the master to load, unload, or repair any small vessel. The new subsection retains this exclusion and states that the term includes any employee engaged in maritime employment, any longshoreman or other person engaged in longshoring operations, and any harbor-worker (including any ship repairman, shipbuilder, and shipbreaker).

Id. at 14, 1972 *U.S. Code Cong. & Admin. News*, at 4711.[17] *See also id.* at 10-11, 1972 *U.S. Code Cong. & Admin. News*, at 4707-08. Henceforth, Congress determined in 1972, coverage under the LHWCA would no longer hinge upon the fortuitous accident of "situs" alone; instead, LHWCA coverage is to be determined by "situs" *and* "*status*"—the requisite "status" being engagement in "maritime employment . . . (including any ship repairman, shipbuilder, and shipbreaker)." *See Director, Office of Workers' Compensation Programs v. Perini North River Associates*, 459 U.S. 297, 313-20 (1983); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 264-65 (1977).[18]

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[17] By the terms of Section 3(a) of the LHWCA, 33 U.S.C. § 903(a) [App. at 93a], coverage under the Act extends to all "employee[s]" as defined in Section 2(3).

[18] As amended, Section 2(3) provides that:

> The term "employee" means *any person engaged in maritime employment*, including any longshoreman or other person en-

The other problem which Congress sought to address in 1972 related to the pleas of "employer groups" for the "modification of a long line of Supreme Court rulings" concerning the tort liability of shipowners. *Id.* at 1, 1972 *U.S. Code Cong. & Admin. News*, at 4699. Specifically, Congress was concerned (i) that vessel owners were being subjected to the imposition of strict liability under the "unseaworthiness" doctrine recognized in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), and its progeny and (ii) that large portions of those strict-liability recoveries were being passed on to LHWCA-covered employers under the implied contractual indemnity theory articulated in *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956), and its progeny. *See id.* at 5, 1972 *U.S. Code Cong. & Admin. News*, at 4701-05.

Congress reacted to this very specific concern with very specific legislation. First—and, in its view, foremost—it eliminated the *Sieracki*-based strict-liability "unseaworthiness" remedy, thus making vessel-owners liable only for their own negligence, "just as land-based third parties . . . are liable for damages when, through their fault, a worker is injured." *Id.* at 4, 1972 *U.S. Code Cong. & Admin. News*, at 4702. Then, it acted to prohibit any third-party recovery *by a vessel* against an LHWCA-covered employer. *See id.* at 7, 1972 *U.S. Code Cong. & Admin. News*, at 4704. The House of Representatives Committee on Education and Labor explained the 1972 amendment of Section 5 as follows:

> One of the most controversial and difficult issues which the Committee has been required to resolve in connection with this bill concerns the liability of ves-

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gaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker [with certain exceptions not here applicable].

33 U.S.C. § 902(3) [App. at 93a] (emphasis added).

sels, as third parties, to pay damages to longshoremen who are injured while engaged in stevedoring operations. The Committee rejected the proposal, originally advanced by the industry, that vessels should be treated as joint employers of longshoremen or other persons covered under this Act working on board such vessels. This would result in restricting the vessel's liability in all cases to the compensation and other benefits payable under the Act. The Committee believes that where a *longshoreman or other worker covered under this Act* is injured through the fault of the vessel, the vessel should be liable for damages as a third party, just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured.

The Committee also rejected the thesis that a vessel should be liable without regard to its fault for injuries sustained by employees covered under this Act while working on board the vessel . . . .

• • • •

Accordingly, the Committee has concluded that, given the improvement in compensation benefits which this bill would provide, it would be fairer to all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness. This would place vessels in the same position, insofar as third party liability is concerned, as land-based third parties in non-maritime pursuits.

The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as "unseaworthiness", "nondelegable duty", or the like.

> *Persons to whom compensation is payable under the Act retain the right to recover damages for negligence against the vessel*, but under these amendments they cannot bring a damage action under the judicially-enacted doctrine of unseaworthiness.

Id. at 4, 6, 1972 *U.S. Code Cong. & Admin. News*, at 4701-02, 4703 (emphasis added),[19]

Thus, as amended in 1972, Section 5(b) of the LHWCA —the provision here at issue—provides that:

> In the event of injury *to a person covered under this chapter* caused by the *negligence of a vessel*, then such person . . . *may bring an action* against such vessel . . . .

33 U.S.C. § 905(b) [App. at 92a] (emphasis added).[20] The remedy made available by Section 5(b) is expressly made available to *all persons covered* under the LHWCA. And, as discussed above, coverage under the LHWCA extends, pursuant to Section 3(a), to any "employee" as defined by Section 2(3) of the Act. *See* pages 11-12 and note 17 *supra*.

The decision of the court of appeals below—that the Section 5(b) remedy is available only to those LHWCA-covered workers who can additionally demonstrate that they independently satisfy judicially developed criteria

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[19] *See also id.* at 22, 1972 *U.S. Code Cong. & Admin. News*, at 4719 ("This section amends section 5, adding a new subsection (b) which provides that a *person covered under this Act* who is injured due to the negligence of a vessel may sue the vessel for damages.") (emphasis added).

[20] As noted above, Congress amended Section 905(b) in 1984, prospectively to preclude tort actions of any kind against LHWCA employers, even in a vessel-owner capacity. *See* Public Law No. 98-426, §§ 5(a)(1), 28(c), 98 Stat. 1641, 1655; note 2 *supra*. The amendment has no effect either upon litigation such as the instant case (which involves pre-amendment injuries) or upon cases like *Drake* (in which the negligent vessel owner is not the injured party's employer).

for general admiralty jurisdiction—flies in the face of the clear language of the statute, the statute's legislative history, and the prior decisions of at least two other courts of appeals and, indeed, of this Court.

II. The Decision of the Court of Appeals Conflicts With Prior Decisions of the United States Courts of Appeals for the Fifth and Ninth Circuits.

The ruling of the court of appeals below—that a shipyard worker engaged in maritime employment within the meaning of Section 2(3) of the LHWCA may not sue a negligent vessel owner under Section 5(b) of that Act unless he is able to demonstrate that his cause of action independently satisfies the general admiralty jurisdiction "nexus" criterion of *Executive Jet Aviation Co. v. City of Cleveland*, 409 U.S. 249 (1972)—conflicts directly and irreconcilably with the prior rulings of at least two other courts of appeals.

In *Perkins v. Marine Terminals Corp.*, 673 F.2d 1097 (9th Cir. 1982), and in *Hall v. Hvide Hull No. 3*, 746 F.2d 294 (5th Cir. 1984), *cert. denied sub nom. Avondale Shipyards v. Rosetti*, 54 U.S.L.W. 3212 (U.S. Oct. 7, 1985), the courts of appeals fairly and accurately construed the terms of the LHWCA as amended in 1972 and ruled, expressly and unequivocally, that a person engaged in maritime employment within the meaning of Section 2(3) of the LHWCA *is* entitled to sue a negligent vessel owner under Section 5(b) of the Act *irrespective* of his ability independently to satisfy the general jurisdictional "nexus" requirement of *Executive Jet*. In each case, the court recognized that "maritime employment"—as expressly defined by Congress in the LHWCA—is *itself* a "maritime activity," and does *itself* constitute a sufficient "nexus" for the maintenance of a vessel-owner action under Section 905(b). In *Perkins*, the Court of Appeals for the Ninth Circuit ruled that:

> [The plaintiff] was engaged in maritime employment for purposes of the status test set forth in 33

> U.S.C. § 902(3). We believe that this factor alone constitutes a sufficient nexus to traditional maritime activity to create admiralty jurisdiction in this case.

673 F.2d at 1101. Two years later, in *Hall*, the Court of Appeals for the Fifth Circuit reached the same conclusion:

> For purposes of federal admiralty jurisdiction, maritime connexity (*Executive Jet*'s requirement that the injury be in a "traditional maritime activity") was, in effect, Congressionally so determined through Congressional acceptance, in the 1972 revision of the Longshoremen's Act, of pre-1972 traditional judicial determinations of the maritime character of the activity involved in injuries to these amphibious workers. Thus, shipbuilding employees injured in constructing a vessel on navigable waters are regarded by § 905(b) as no less injured in a maritime employment than they were, before the enactment of § 905(b) in 1972, by the pre-1972 jurisprudence.

746 F.2d at 303. The conflict between those decisions and the decision below is real; it is clear;[21] and it is significant.

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[21] In its opinion in *Drake*—by which the decision below was expressly "governed" (772 F.2d at 1030 [App. at 13a])—the Court of Appeals for the First Circuit itself acknowledged that its ruling conflicts squarely with the Fifth Circuit decision in *Hall*:

> We recognize that there are cases which have either ignored or overlooked the *Executive Jet* nexus test in determining whether a tort was cognizable under § 905(b). These are *Landy* v. *Litton Systems, Inc.*, 624 F.2d 390 (5th Cir. 1980), *cert. denied*, 450 U.S. 913, 101 S.Ct. 1353, 67 L.Ed.2d 337 (1981), *McCarthy* v. *The Bark Peking*, 716 F.2d 130 (2d Cir. 1983), and *Hall* v. *Weeks Hull No. 3*, 746 F.2d 294 (5th Cir. 1984). Of these, only the *Hall* opinion requires discussion, for it utilizes and extends the analysis used in the prior two cases.
>
> * * * *
>
> Insofar as the *Hall* panel held that only maritime torts are cognizable under § 905(b) we are in agreement. Our disagreement lies in that court's creation of a double standard for

When it amended the LHWCA in 1972, Congress intended to create a remedy in tort for *any* "person covered by [the LHWCA]" injured by the negligence of a vessel owner.[22] It did *not* impose any other jurisdictional prerequisites, and it did *not* empower the courts to create any such extraneous prerequisites. The Courts of Appeals for the Ninth and Fifth Circuits, in *Perkins* and in *Hall*, recognized this obvious fact; the Court of Appeals for the First Circuit, in *Drake* and in this case, did not.

The court below has seen fit by judicial fiat to eliminate the congressionally conferred vessel-owner remedy for any LHWCA-covered worker who is unable to prove (independently of his maritime employment) that his cause of action otherwise "bear[s] a significant relationship to traditional maritime activity" as that phrase was used by this Court in *Executive Jet*.[23] Such a result is

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maritime tort jurisdiction. For actions brought under § 905(b) the Fifth Circuit would apparently revert to pre-1972, and pre-*Executive Jet* standards and apply only a situs test; for actions under general maritime jurisdiction, it would require satisfaction of both the situs and nexus tests.

> We discern no basis for this construction of the jurisdictional range of § 905(b). . . . We have discerned no predicate for the Fifth Circuit's unusual rule in law, logic, legislative history, or policy and we decline to hold that jurisdiction under § 905(b) requires satisfaction merely of the definitional elements of the provision, and the situs requirement.

Drake v. Raymark Industries, Inc., *supra*, 772 F.2d at 1016-17, 1018 [App. at 76a-77a, 79a-80a] (footnote omitted).

[22] As discussed above, uniformity in the treatment of all persons covered by the LHWCA was a major objective of the 1972 amendments to that statute. *See* pages 11-12 *supra*.

[23] It is inconceivable, of course, that Congress intended in October of 1972 (when it amended the LHWCA) to adopt and incorporate into the statute jurisdicitonal concepts not even announced by this Court until December of 1972 (when it decided *Executive Jet*). Nor is it conceivable, Eagle-Picher submits, that this Court intended by its *Executive Jet* decision *sub silencio* to alter or rearrange the

improper and unfair, and gives rise to a situation in which the substantive federal rights of maritime workers—and those of unrelated third parties, such as Eagle-Picher here, who suffer losses as the result of vessel-owner negligence—are materially different in the First Circuit than they are elsewhere in the country. The resultant disparity can be eliminated only by a definitive resolution of the issue by this Court.

III. The Decision of the Court of Appeals Conflicts With Prior Decisions of This Court.

In 1983, this Court specifically and unequivocally rejected the notion that coverage under the LHWCA is dependent upon a maritime worker's ability to satisfy the general jurisdictional "nexus" requirement of *Executive Jet*. Specifically, in *Director, Office of Workers' Compensation Programs v. Perini North River Associates*, 459 U.S. 297 (1983), the Court was asked to restrict coverage under the LHWCA by superimposing the *Executive Jet* concept of "nexus" upon the congressionally established "status" requirement embodied in the Act's definition of "maritime employment." It emphatically refused to do so:

> Perini cites our decision in Executive Jet . . . and argues that the LHWCA is premised upon admiralty jurisdiction, which requires a connection between an employee and traditional maritime activity. Perini's reliance on Executive Jet is misplaced . . . .
>
> The explicit language of Executive Jet makes it clear that our discussion was occasioned by "the problems involved in applying a locality-alone test of admiralty tort jurisdiction [under 28 U.S.C. § 1333

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statutory scheme so carefully created by the Congress just two months earlier. Yet the decision below rests squarely on the court's having ascribed such fanciful intentions to the Congress and to this Court. *See* 772 F.2d at 1030 [App. at 13a-14a]; *Drake v. Raymark Industries, Inc., supra*, 772 F.2d at 1012, 1014 [App. at 67a-68a, 71a-72a].

> (1)] to the crashes of aircraft" in a situation where "the fact that an aircraft happens to fall in navigable waters, rather than on land, is wholly fortuitous." 409 U.S. at 265, 266. . . . Although the term "maritime" occurs both in 28 U.S.C. § 1333(1) and in § 2(3) of the [LHWCA], these are two different statutes "each with different legislative histories and jurisprudential interpretations over the course of decades." Boudreaux v. American Workover, Inc., 680 F.2d 1034, 1050 (CA5 1982). . . .

459 U.S. at 320 n.29.[24] The decision below—which restricts the availability of a remedy expressly conferred by Congress in the LHWCA through the superimposition of jurisdictional concepts relevant only to 28 U.S.C. § 1333(1)—conflicts with this Court's ruling in *Perini*.[25]

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[24] "In addition," the Court went on, "Churchill [like the injured maritime employees here], as a maritime construction worker, was by no means 'fortuitously' on the water when he was injured." *Id.*

[25] The appellate court's half-hearted attempt to distinguish *Perini* from *Drake* (and the instant case)—"*Perini* was concerned solely with *compensation* [under the LHWCA], and not with maritime tort jurisdiction" (*Drake v. Raymark Industries, Inc., supra*, 772 F.2d at 1018 [App. at 79a] (emphasis in original))—serves only to highlight the conflict between the decisions. In the first place, general admiralty tort jurisdiction is not an issue here; the substantive availability of a federal tort remedy is. *See id.* at 1014 n.3 [App. at 72a]. Furthermore, *compensation under the LHWCA* and the *availability of a vessel-owner tort remedy under Section 905(b)* are *both expressly* provided by the Act to *all* "employees" "covered" by the statute. *Compare* 33 U.S.C. §§ 904(a), 907(b), 908, 909 (compensation) *with* 33 U.S.C. § 905(b) (tort remedy against negligent vessel owner) *and* 33 U.S.C. §§ 903(a), 902(3) (LHWCA coverage and definition of "employee"). *See also* H.R. Rep. No. 92-1441, *supra*, at 6, 1972 *U.S. Code Cong. & Admin. News*, at 4703 ("*Persons to whom compensation is payable under the Act* retain the right [under Section 5(b)] to recover damages for negligence against the vessel . . . .") (emphasis added). This Court ruled in *Perini* that coverage under the LHWCA is to be determined without regard to the general jurisdictional "nexus" requirement of *Executive Jet*; and the LHWCA expressly provides a vessel-owner remedy to any "person covered" by the statute. 33 U.S.C. § 905(b). The conflict

Ironically, the decision below also conflicts with the very decision of this Court upon which it purports to rely. This Court's decision in *Executive Jet* was expressly and very carefully limited so as *not* to create new barriers to congressionally authorized causes of action:

> For the reasons stated in this opinion we hold that, *in the absence of legislation to the contrary*, there is no federal admiralty jurisdiction over aviation tort claims arising from flights by land-based aircraft between points within the continental United States.[26]

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[26] Some such flights . . . no doubt involve passage over "the high seas beyond a marine league from the shore of any State." To the extent that the terms of the Death on the High Seas Act become applicable to such flights, that Act, of course, is "legislation to the contrary" [and tort remedies provided by that statute *are* available without reference to the general jurisdictional "nexus" requirement].

409 U.S. at 274 & n.26 (emphasis added); *see id.* at 268. Here, the terms of the LHWCA are obviously applicable, and they expressly provide a tort remedy for all persons covered by that Act. The LHWCA therefore constitutes "legislation to the contrary" which precludes the judicial imposition of extraneous barriers to the assertion of rights thereunder.

The decision below therefore conflicts also with *Executive Jet* itself.

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between the decision below and this Court's decision in *Perini* is clear and irreconcilable.

CONCLUSION

For the foregoing reasons, a writ of *certiorari* should be granted.

Respectfully submitted,

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DONALD W. FOWLER
EDWARD M. FOGARTY

January 24, 1986

85-1253

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EAGLE-PICHER INDUSTRIES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

No. 84-1779

IN RE ALL MAINE ASBESTOS
LITIGATION (PNS CASES)

PETITION OF UNITED STATES OF AMERICA

Argued Jan. 9, 1985

Decided Sept. 18, 1985

Joseph B. Cox, Jr., Torts Branch, Civil Div., U.S. Dept. of Justice, Washington, D.C., with whom David S. Fishback, Torts Branch, Civil Div., U.S. Dept. of Justice, Harold J. Engel, Asst. Director, Peter A. Nowinski, Special Litigation Counsel, Washington, D.C., Richard S. Cohen, U.S. Atty., Portland, Me., and Richard K. Willard, Acting Asst. Atty. Gen., Washington, D.C., were on brief for petitioner.

Jeffrey Silberfeld with whom Rivkin, Leff, Sherman & Radler, James G. Goggin and Verrill & Dana, Portland, Me.. were on brief for Pittsburgh Corning Corp.

Mark G. Furey, Portland, Me., with whom Thomas R. McNaboe and Thompson, McNaboe & Ashley, Portland, Me., were on brief for Raymark Industries, Inc.

Edward M. Fogarty, New York City, with whom Donald W. Fowler, Joe G. Hollingsworth, William J. Spriggs,

Spriggs Bode & Hollingsworth, Washington, D.C., John R. Linnell and Linnell, Choate & Webber, Auburn, Maine, were on brief for Eagle-Picher Industries, Inc.

Before COFFIN, BOWNES and TORRUELLA, Circuit Judges.

BOWNES, Circuit Judge.

This interlocutory appeal regarding third-parties' claimed right to proceed against the United States for noncontractual indemnity or contribution constitutes one more step toward a determination of who shall be ultimately liable for the injuries to workers resulting from their exposure to asbestos in the Portsmouth Naval Shipyard (PNS). All of the workers whose injuries are the subject of the primary actions in this portion of the Maine asbestos cases are present or former civilian federal employees of PNS located at Kittery, Maine. In numerous individual actions,[1] the workers or their representatives (plaintiffs), sued twenty-six manufacturers and distributors (defendants) for occupational disease or wrongful death caused by their exposure to asbestos dust that was created by the manufacturers' asbestos products. This exposure allegedly occurred while the workers were performing construction or repair work on U.S. naval vessels.

According to the complaints, plaintiffs seek to recover compensatory and punitive damages for injuries caused by the breach of required duties of care. Specifically, plaintiffs charge the defendant manufacturers with failure to use reasonable care in providing warnings to workers about the products' dangers and about the proper precautions to be taken when working with or near their asbestos products; failure to test their products and conduct safety research on them; and failure to remove the products from the market. Hence, the causes of action asserted are based on negligence, strict liability, and

[1] The district court declined to certify any class actions.

breach of express and implied warranties. Jurisdiction is based upon diversity of citizenship. *Austin v. Unarco Industries, Inc.*, 705 F.2d 1, 3 (1st Cir.), *cert. dismissed*, 463 U.S. 1247, 104 S.Ct. 34, 77 L.Ed.2d 1454 (1983).

No suit was brought by any plaintiff against the government on any theory. As government employees, their exclusive remedy against the United States was under the Federal Employees' Compensation Act, 5 U.S.C. §§ 8101, 8116(c), which provides no-fault compensation for work-related injury or death.

Shortly after the filing of plaintiffs' complaints, defendants sought to implead the United States as a third-party defendant. Defendants charged that the United States had breached various contractual and tort duties of care to them and to the federal employees. Judge Gignoux, who has shepherded these consolidated actions since their inception, directed defendants to file a model third-party complaint containing all the theories they sought to press in their third-party actions. The pertinent complaint thereafter filed [2] contained nine separate counts. In response to the United States' motion, the district court dismissed all but one count of the model third-party complaint and reserved judgment on Count VI. *See In re All Maine Asbestos Litigation*, 581 F.Supp. 963, 980-81 (D.Me.1984). Count VI, which seeks noncontractual indemnification and/or contribution,[3] is predicated

---

[2] Defendants actually filed two third-party complaints against the United States. The first, designated "Model Third-Party Complaint A," was filed in reference to cases where the injured worker was employed by Bath Iron Works, a *private* shipyard. In contrast, Model Third-Party Complaint B, the subject of this appeal, was filed in reference to cases where the injured worker was a *government* employee at Portsmouth Naval Shipyard.

[3] The defendant manufacturers do not concede that the other eight counts were properly dismissed, but this question is not before us; although the district court certified its disposition of all nine counts, we accepted for interlocutory appeal only Count VI.

upon the Federal Tort Claims Act (hereinafter FTCA), 28 U.S.C. §§ 1346(b), 2671 *et seq.* The FTCA provides, *inter alia*, that subject to certain exceptions, the government "shall be liable" in tort "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674.

The district court denied the government's motion to dismiss Count VI in a supplemental opinion. *In re All Maine Asbestos Litigation (PNS Cases)*, 589 F.Supp. 1563 (D.Me.1984). The court held that under the analytical approach mandated by the FTCA, the liability of the United States would be determined on the basis of the law a Maine court would apply to an analogous shipyard employer. Applying Maine law, the court held that it was unclear whether Maine courts would recognize the "dual capacity" doctrine as a means of imposing liability on a workers' compensation-paying shipyard employer which is also a ship owner, as the United States is in this instance. While Maine law clearly prohibits any form of additional liability, including third-party liability, imposed upon employers covered by the state workers' compensation statute, the district court found that it was not clear whether this protection extended to a third-party claim for noncontractual indemnity or contribution brought against a compensation-paying private employer in its capacity as a vessel owner. The district court was of the opinion that the only appropriate course was to certify the question to the Supreme Judicial Court of Maine, and that it would do so after a trial on the merits.[4]

---

[4] The Maine Supreme Judicial Court has indicated that before answering a certified question, it would prefer to have a record showing that the certified question will be dispositive of the case. *See* Maine R.Civ.P. 76B(a); *White v. Edgar*, 320 A.2d 668, 677 (Me. 1974); *In re Richards*, 223 A.2d 827, 833 (Me. 1966); *see*

At the United States' request, the question whether Count VI, too, should have been dismissed was certified and accepted for interlocutory appeal.[5] This count contains two distinct theories of recovery. First, defendants press what may be summarized as land-based theories, *i.e.*, alleged negligence of the government in its capacities as the plaintiffs' employer and as the owner of the shipyard. Second, defendants seek contribution or indemnity from the United States because of its alleged status as owner of the vessels on which the underlying plaintiffs worked at the time of their asbestos exposure. The gravamen of the claim is that, as the owner of the ships being constructed or repaired, the United States failed to exercise the appropriate level of care regarding the conditions under which the workers performed their duties, a dereliction of duty which allegedly was the proximate cause of the workers' injuries. Defendants base their second claim on the Longshore [6] and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b). Whether either theory of liability contained in Count VI should have been dismissed is the question before us at this time, and we discuss their merits separately.

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also Gagne v. Carl Bauer Schraubenfabrick, 595 F.Supp. 1081, 1088 (D.Me. 1984).

[5] For some reason the parties failed to comply with the responsibilities imposed upon them by Fed.R.App.P. 10 and 11, and Local App.R. 8(b), *viz*, that they assemble and file the record in this case. The only papers this court received were a copy of Model Third-Party Complaint B, the United States' answer, and a copy of the Master Docket for *In re All Maine Asbestos Litigation*. The court, on its own initiative, had to examine the papers on file in the district court. The parties were not released from their responsibilities to assemble the record merely because this was an interlocutory appeal.

[6] Congress has modified the name of the Act by changing "Longshoremen" to "Longshore." *See* Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub.L. No. 98-426, § 27(d).

I. LAND-BASED THEORIES OF LIABILITY

A

The defendants allege that governmental third-party liability exists because the underlying plaintiffs' land-based exposure to asbestos was a result of the government's negligence in its capacity as employer and as shipyard owner. The government replies that the "only ruling timely brought to this Court . . . [is] the government's appeal of the district court's adverse ruling as to the vessel owner claim." The government argues that the denial of appellee's petition to bring all other issues before this court on interlocutory appeal "precludes consideration of the manufacturers' claims other than that against the government *qua* vessel owner."

The government is correct that this court allowed interlocutory appeal on only the denial of the dismissal of, or alternatively, of summary judgment on, Count VI. We do not, however, read Count VI as narrowly as the government. In Count VI, defendants allege claims against the government not only in its capacity as a vessel owner but also "as the owner of the shipyards . . . the designer of the specifications . . ., and as the general supervisor of the work performed . . . ." Model Third-Party Complaint B, ¶ 39. Although the district court stated that "Count VI . . . does not . . . assert a claim against the United States in its capacity as an employer, but in its capacity as a vessel owner," we think that Count VI on its face encompasses employer and shipyard owner theories.

Regardless of the fact that the district court did not read Count VI as stating a claim against the government *qua* employer, it discussed and applied the relevant situs law that governs land-based employers as an analytical step in its disposition of the vessel owner claim. We do not think, therefore, that the district court's failure to make a separate ruling on the land-based the-

ories of liability bars our review of them. No prejudice will result to either party and we have all the facts necessary for such a review.

B

As the district court noted, "[i]t is undisputed that the PNS employees and deceased employees in these cases were covered by the Federal Employees' Compensation Act (FECA), 5 U.S.C. § 8101 *et seq.*, and that they are barred from suing the United States as their employer by FECA's exclusive liability provision, 33 U.S.C. § 8116(c)." Interpreting these provisions recently, the Supreme Court held that "FECA's exclusive-liability provision, 5 U.S.C. § 8116(c), does not directly bar a third-party indemnity action against the United States." *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 199, 103 S.Ct. 1033, 1038, 74 L.Ed.2d 911 (1983).

The Court added, however, that other substantive law affirmatively granting the right to proceed against the government must be identified in order to maintain such a third-party action. *See id.* at 197 n. 8, 199, 103 S.Ct. at 1037 n. 8, 1038; *accord Prather v. Upjohn Co.*, 585 F.Supp. 112, 114 (N.D.Fla.1984). Consequently, we find that the district court was correct in turning initially to the substantive provisions of the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80, on which jurisdiction for Count VI is predicated, to determine whether defendants could maintain their action.

C

The Federal Tort Claims Act is a limited waiver of sovereign immunity that subjects the United States to tort liability within certain parameters. The FTCA provides in pertinent part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the

> same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

28 U.S.C. § 2674. The waiver extends to third-party claims against the government. *United States v. Yellow Cab Co.*, 340 U.S. 543, 71 S.Ct. 399, 95 L.Ed. 523 (1951). And it extends to third-party claims against the government for losses incurred by third-parties as the result of injuries to federal employees covered by FECA where other applicable substantive law grants a right of recovery. *Lockheed*, 460 U.S. at 198, 103 S.Ct. at 1038.

Section 2674 is amplified by a sister provision stating that, subject to certain exceptions, federal district courts are granted subject matter jurisdiction over claims to redress injury caused by any employee of the government "under circumstances where the United States, *if a private person*, would be liable to the claimant *in accordance with the law of the place where the act or omission occurred.*" 28 U.S.C. § 1346(b) (emphasis added). To identify the applicable rule of substantive law, the FTCA directs us to determine the substantive law that would apply to "a private individual under like circumstances" in the jurisdiction where the injury occurred. We therefore look to whether a private person in like circumstances would be liable under the law of Maine, the situs state. *United States v. Muniz*, 374 U.S. 150, 153, 83 S.Ct. 1850, 1853, 10 L.Ed.2d 805 (1963); *Brooks v. A.R. & S. Enterprises, Inc.*, 622 F.2d 8, 10 (1st Cir.1980).

All parties agree with the district court that "a private individual under like circumstances" is a compensation-paying private shipyard employer in Maine. They differ, however, on what kind of compensation system is to be ascribed to the analogous private employer for purposes of the FTCA analysis. The defendant asbestos manufacturers contend that the analogous private employer is a

private shipyard employer with a FECA-like workers' compensation system. The United States and the district court posit that an analogous private shipyard employer would be covered under the Maine Workers' Compensation Act (the Maine Act or MWCA), 39 Me.Rev.Stat. Ann. § 1 *et seq.* (1978 & Supp.1984-85).

In the companion case of *Drake v. Raymark Industries, Inc.*, 772 F.2d 1007 (1st Cir.1985), we determined that a compensation-paying private shipyard employer in Maine, Bath Iron Works, was concurrently covered by both the Maine Act and Longshore and Harborworkers' Compensation Act. We held that both Acts barred contribution and noncontractual indemnity actions, such as defendants seek to maintain here, against a compensation-paying employer. The *Drake* ruling governs the question here and requires that defendants' third-party claims against the government in its capacity as employer be dismissed. *See id.* at 1019-1022.

Defendants argue, however, that § 4 of the Maine Act bars none of their claims because that statute by its terms cannot apply to the United States. For the same reason, neither could the Longshore Act apply to the government. This latter argument, however, was not made by defendants undoubtedly because it would have negated their vessel owner negligence claim predicated on the application of the Longshore Act to the United States despite the government's exclusion from its coverage. Nevertheless, they contend that considering the United States as "a private individual under like circumstances" as the FTCA mandates, the proper analogy is a private employer covered by FECA and not by the Maine Act. Under such an approach, the type and provisions of the applicable workers' compensation system is one of the "circumstances" that must be factored into the analysis. The appropriate analogy, therefore, is a private shipyard employer covered by a workers' com-

pensation scheme like FECA, with an exclusivity provision worded and interpreted like that of FECA. Because *Lockheed* held that FECA's exclusivity provision did not bar third-party actions such as this, the defendants claim that Count VI's land-based theories of liability may proceed. In their view, the Maine Act's exclusivity provision is simply inapplicable and irrelevant.

We find this reasoning unpersuasive. A private shipyard employer in Maine, as is Bath Iron Works, would be covered by the MWCA as well as the LHWCA, and the FTCA defines the United States' liability as that of "a private individual in like circumstances." 28 U.S.C. § 2674. As one court has noted,

> unless the phrase "under like circumstances" is read to nullify the phrase "private individual" and not to modify it, [the state compensation scheme] must apply to [third-party plaintiffs'] claims. It is of course possible to argue that FECA is one of the "circumstances" which define the liability of the United States as a shipyard employer; FECA does not, however, apply to a "private individual." Applying FECA would therefore be facially inconsistent with the language of the FTCA.

Colombo v. Johns-Manville Corp., 601 F.Supp. 1119, 1128 (E.D.Pa.1984). *Accord Roelofs v. United States*, 501 F.2d 87, 92-93 (5th Cir.1974) (state workers' compensation system, including defenses available to covered employers, is the law applied to the United States under FTCA even though the government was not in actuality covered under the state compensation law); *see also Stewart v. United States*, 716 F.2d 755, 765 (10th Cir. 1982) (same), *cert. denied*, —— U.S. ——, 105 S.Ct. 432, 83 L.Ed.2d 359 (1984). We hold that these land-based third-party claims are barred by § 4 of the Maine Workers' Compensation Act and 33 U.S.C. § 905(a).

II. THIRD-PARTY LIABILITY OF THE UNITED STATES AS VESSEL OWNER UNDER § 905(b)

In Count VI of Model Third-Party Complaint B, defendant manufacturers also press a claim against the United States for shipowner negligence, purportedly based on the Longshore and Harbor Workers' Compensation Act (LHWCA or Longshore Act), 33 U.S.C. § 905(b). They cite the FTCA as again providing the necessary waiver of sovereign immunity.

Although federal workers are expressly excluded from LHWCA coverage, *see* 33 U.S.C. § 903(a)(2), defendants contend that by employing the FTCA analogical method properly, this exclusion is rendered irrelevant. Defendants reason that "a private person under like circumstances" to the United States, 28 U.S.C. § 2674, is a vessel owner. Applying the law of the place as required by the FTCA, 28 U.S.C. §§ 1346(b), 2674, means whatever law, and choice of law rules, the locality would apply in a given case, *Richards v. United States*, 369 U.S. 1, 11-13, 82 S.Ct. 585, 591-593, 7 L.Ed.2d 492 (1962); *Hess v. United States*, 361 U.S. 314, 318 n. 7, 80 S.Ct. 341, 345 n. 7, 4 L.Ed.2d 305 (1960). Defendants claim that federal substantive law, and specifically, the Longshore Act, would have to be utilized by Maine courts to determine the viability of the shipowner negligence claim. *See Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983); *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, at 165 n. 13, 101 S.Ct. 1614, at 1621 n. 13, 68 L.Ed.2d 1 (1981) (negligence actions that are brought against the shipowner pursuant to § 905(b) are governed by federal maritime principles).

We doubt whether we can ignore an express congressional exclusion of federal workers from coverage under the LHWCA, and employ an FTCA analogy by which coverage can be analogically presumed so as to render

the United States vulnerable to a shipowner negligence suit. It is well-established that the terms of the waiver as set forth expressly and specifically by Congress define and delimit the boundaries of the court's subject matter jurisdiction to entertain suits brought against the government. *See United States v. Orleans*, 425 U.S. 807, 813-14, 96 S.Ct. 1971, 1975-76, 48 L.Ed.2d 390 (1976); *Dalehite v. United States*, 346 U.S. 15, 30-31, 73 S.Ct. 956, 965, 97 L.Ed. 1427 (1953). Where a provision of the FTCA excludes what would otherwise be a potential cause of action, no action against the government is permitted. *See, e.g., United States v. S.A. Empresa de Viacao (Varig Airlines)*, —— U.S. ——, 104 S.Ct. 2755, 2762, 81 L.Ed.2d 660 (1984). Moreover, where other federal policies, express or implied, preclude what would otherwise be a potential cause of action, no action against the government may stand. *See Johansen v. United States* 343 U.S. 427, 436-440, 72 S.Ct. 849, 855-857, 96 L.Ed. 1051 (1952); *see also Laird v. Nelms*, 406 U.S. 797, 802-03, 92 St.Ct. 1899, 1902-03, 32 L.Ed.2d 499 (1972).[7]

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[7] Unfortunately, *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 103 S.Ct. 1033, 74 L.Ed.2d 911 (1983), does not dispose of this FTCA thicket. In *Lockheed* the Court was confronted with determining whether the exclusivity provision of FECA, 5 U.S.C. § 8116(c), barred a properly-brought FTCA action that the underlying substantive law otherwise would have permitted. Here, we are concerned with more fundamental questions, such as whether the underlying substantive law authorizes defendants' vessel owner negligence action, and additionally, whether we are required to deem an express exclusion of the United States from coverage under the LHWCA overridden by the FTCA.

It seems likely that the express exclusion of federal employees raises a bar to the third-party shipowner action sought here, similar to that recognized in *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977) (*Feres* doctrine will not be overridden for third parties). For us to permit a vessel owner suit against the government in these circumstances would likely be "to judicially admit at the back door that which has been legislaitvely turned away at the front door." *Stencel Aero*

But we shall bracket these FTCA-based concerns and assume for the purposes of our analysis that defendants seek to maintain a third-party contribution and indemnity action against a private shipyard which owns the ships on which the plaintiffs worked with and proximate to asbestos products.

So stated, this question is also governed by our opinion in *Drake v. Raymark Industries.* In *Drake* we held that defendant manufacturers' third-party claim against a private shipyard as owner *pro hac vice* would not lie under § 905(b) because that section countenances only maritime torts. *Drake v. Raymark Industries, Inc.*, at 1012. Since to qualify as a maritime tort the wrong must have borne some relationship to "traditional maritime activity," *Executive Jet Aviation v. Cleveland*, 409 U.S. 249, 261, 93 S.Ct. 493, 501, 34 L.Ed.2d 454 (1972), and the universal ruling of all circuits to have considered this type of wrong is that it does not bear such a relationship, *see Drake*, at 1015-1016;[8] no § 905(b) action could have been brought by plaintiffs against the owners of the ships on which they were doing construction or repair work. It follows that defendants have no

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Engineering, 431 U.S. at 673, 97 S.Ct. at 2059 (quoting *Laird v. Nelms*, 406 U.S. 797, 92 S.Ct. 1899, 32 L.Ed.2d 499; *In re Agent Orange Product Liability Litigation*, 506 F.Supp. 762, 772 (E.D.N.Y. 1980)). Because the substantive law question is dispositive, and rests on well-established legal principles, we do not determine the impact of the LHWCA exclusion of federal employees on defendants' third-party action.

[8] *See also Oman v. Johns-Manville Corp.*, 764 F.2d 224 (4th Cir. 1985) (*en banc* overruling of *White v. Johns-Manville Corp.*, 662 F.2d 234 (4th Cir. 1981)); *Myhran v. Johns-Manville Corp.*, 741 F.2d 1119 (9th Cir. 1984); *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775 (11th Cir. 1984); *Lowe v. Ingalls Shipbuilding*, 723 F.2d 1173, 1187-90 (5th Cir. 1984); *Austin v. Unarco Industries*, 705 F.2d 1 (1st Cir. 1983); *cf. Keene Corp. v. United States*, 700 F.2d 836, 843-45 (2d Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 195, 78 L.Ed.2d 171 (1983).

contribution action under the section, either, since the only duties alleged to have been owed were owed to the employees, not the defendants. Accordingly, we rule that defendants' contribution and indemnity action against the third-party defendant based upon § 905(b) must be dismissed for failure to state a claim on which relief can be granted.

The district court did not analyze the defendants' vessel owner contribution action as we have.[9] It did hold that federal substantive law did not provide defendants with a vessel owner action against the government, a result that accords with our own. The district court went further, however, and held that the action would lie, if at all, on the basis of a Maine recognition of the dual capacity doctrine. The court then noted that it was unclear whether Maine recognizes the dual capacity doctrine, and within that doctrine, whether vessel owner status would be considered distinct enough from the employer capacity to eliminate the immunity from certain suits that employers enjoy under Maine law. Accordingly, the district court ruled that the question would be certified to the Maine Supreme Judicial Court following a trial on the merits. We disagree.

As we explained in *Drake*, the negligence action against a vessel owner from which defendants seek to derive their contribution action was created by Congress as a part of the 1972 LHWCA Amendments. This negligence action was designed to replace the former action for unseaworthiness, a strict liability action. *See* H.R.Rep. No. 92-1441, 92d Cong., 2d Sess. (1972), *reprinted in* 1972

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[9] Neither, to our knowledge, has any other court analyzed the availability of a third-party contribution action under § 905(b) in this manner. *See, e.g., In re All [Hawaii] Asbestos Cases*, 603 F.Supp. 599, 605-606 (D. Hawaii 1984) (on motion for reconsideration); *Colombo v. Johns-Manville Corp.*, 601 F.Supp. 1119, 1132-39 (E.D. Pa. 1984); *In re General Dynamics Asbestos Cases*, 602 F.Supp. 497 (D. Conn. 1984).

U.S.Code Cong. & Ad.News 4698, 4701-05. Maine does not provide a specific cause of action against vessel owners; it would lie, if at all, as an extension of the basic negligence action, and only outside of admiralty jurisdiction, which is exclusively federal.

As we noted in *Austin v. Unarco*, where we decided that admiralty jurisdiction would not lie for a ship construction and repair worker's claims of absestos-engendered injuries:

> [T]he risk encountered by plaintiff's decedent is not a risk arising from the loading or operation of a vessel, against which those on the vessel are typically protected by the vessel owner. It is, rather, *the same risk at that encountered by a number of workers on a shortside construction project.*
>
> Whatever anomalous results may follow from distinguishing between harbor workers according to the maritime nature of the hazards they encounter are at least offset, if not outweighed, by the anomalous results of treating construction workers injured by asbestos poisoning differently depending on whether they were installing asbestos in a ship or in an office building overlooking the harbor. *The state has an interest in providing uniform treatment to these two like workers.*

705 F.2d at 13 (emphasis added).

Defendants have not cited us any authority that suggests that the Maine Supreme Judicial Court would likely recognize the dual capacity doctrine. Indeed, the language employed in its cases suggests the contrary. For instance, in *Roberts v. American Chain & Cable Co.*, 259 A.2d 43 (Me.1969), the Maine Court stated:

> Our act . . . is so general in terminology as to generate the belief that the Legislature may have intended *an all-embracing immunity* in favor of the

> employer cutting across any equitable considerations which our courts in the application of equitable principles might otherwise apply.

259 A.2d at 46 (emphasis added); *see also McKellar v. Clark Equipment Co.*, 472 A.2d 411, 416 (Me.1984) (following *Roberts*) ("The employer's immunity, as defined in *Roberts*, extends to all noncontractual rights of contribution and indemnity" (citations omitted)). Were a suit against a vessel owner to be recognized, it would likely result from the creation of a separate liability for employers for the condition of their premises. But, as Professor Larson has noted, the state courts have "held with virtual unanimity" that workers' compensation-covered employers cannot be sued by their employees on premises liability theories. 2A Larson, The Law of Workmen's Compensation § 78.82, at 14-234 (1983). The obvious reason for these holdings is that "[i]f every action and function connected with maintaining the premises could ground a separate tort suit, the concept of exclusiveness of remedy would be reduced to a shambles." *Id.* at 14-238. Accordingly, defendants' claims against the government in its capacity as vessel owner—a premises liability theory—are also barred. *See Columbo v. Johns-Manville*, 601 F.Supp. at 1131 ("The obligation of the United States to provide a safe workplace and to warn employees about the hazards of certain materials arises solely out of the employment relationship. There is, in effect, no alternative capacity in which to sue an employer on these theories"). *Id.* at 14-238. As the government points out, there are no reported cases even hinting that Maine might deviate from the universal view.

To summarize, defendants have not shown that Maine or any other state has recognized and allowed a suit against an employer *qua* vessel owner under the rubric of dual capacity. Because it has its roots in admiralty, which is within exclusively federal jurisdiction, we find it

difficult to believe that such a suit would be recognized in Maine. We think, therefore, that under these circumstances certification is not necessary on either the dual capacity doctrine or on the availability of a suit against an employer *qua* vessel owner.[10]

Affirmed in part and vacated in part.

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[10] Appellee Pittsburg-Corning argues that the United States may be held liable under a *pro tanto* theory of recovery. This contention runs as follows. Under Maine law, an employer who pays workers' compensation benefits may assert a lien on an employee's recovery from a third-party. Therefore, if the negligence of the United States *qua* employer contributes to the injuries of any of the plaintiffs, the United States should be denied its lien to the extent of its proportionate (*pro tanto*) share of the damages, and any judgment against the defendants should be reduced by an amount equal to the portion of the lien denied.

As the government points out, however, the defendants did not specifically allege entitlement to *pro tanto* relief in their model complaint against the government. This omission contrasts sharply with the same parties' action in the *BIW Cases* where they specifically alleged in Count I a right to *pro tanto* relief. *See BIW Cases*, 589 F.Supp. at 1566. Moreover, we discovered nothing in our review of the record indicating that defendants ever presented this theory to the district court and they make no specific claim that the theory was advanced below. Accordingly, the question of *pro tanto* relief is not properly before us. Even if it were, the Maine Supreme Judicial Court has very recently rejected defendants' position. *See Diamond International Corp. v. Sullivan & Merit, Inc.*, 493 A.2d 1043 (Me. 1985).

APPENDIX B

UNITED STATES DISTRICT COURT
D. MAINE

IN RE ALL MAINE ASBESTOS
LITIGATION (PNS CASES)

July 6, 1984

G. William Higbee, Brunswick, Me., Thomas W. Henderson, Pittsburgh, Pa., William A. Mulvey, Jr., James G. Noucas, Jr., Mark F. Sullivan, Portsmouth, N.H., Lawrence C. Winger, Portland, Me., Melvin I. Friedman, Kreindler & Kreindler, New York City, Dan W. Thornhill, Kittery, Me., Ira A. Levy, P.C., Newark, N.J., Michael P. Thornton, Boston, Mass., Donald G. Lowry, Lowry & Platt, Portland, Me., for plaintiffs.

Peter L. Murray, Thomas C. Newman, Portland, Me., for Amchem Products, Inc.

Harrison L. Richardson, Jeffrey Thaler, Thomas Getchell, Portland, Me., for Armstrong World.

M. Roberts Hunt, Glenn Robinson, Portland, Me., for Celotex Corp.

C. Alan Beagle, Portland, Me., for Combustion Engineering.

Theodore H. Kurtz, South Paris, Me., for Congoleum.

Frederick C. Moore, Portland, Me., for Cummings Insulation and Claremont Co., Inc.

John R. Linnell, Auburn, Me., for Eagle-Picher Industries.

Thomas Schulten, Portland, Me., for Eastern Refractories.

U. Charles Remmel, Portland, Me., for Fibreboard Corp.

Jack H. Simmons, Lewiston, Me., for Forty-Eight Insulations.

Jotham D. Pierce, Jr., Daniel Emery, Portland, Me., for G.A.F. Corp.

George F. Burns, Portland, Me., for Garlock, Inc.

Phillip D. Buckley, Bangor, Me., for Johns-Manville.

Thomas F. Monaghan, Kevin G. Libby, Deborah J. Ross, Portland, Me., for Keene Corp.

Arthur A. Cerullo, Portland, Me., for National Gypsum.

John J. Flaherty, Christopher D. Nyhan, Jonathan S. Piper, Portland, Me., for Nicolet, Inc.

Nicholas S. Nadzo, John Montgomery, Portland, Me., for Owens-Corning Fiberglas.

Peter J. Rubin, Linda Monica, Portland, Me., for Owens-Illinois.

John A. Mitchell, James G. Goggin, Portland, Me., for Pittsburgh Corning.

Charles H. Abbott, Steven Wright, Lewiston, Me., for H.K. Porter Company and Southern Textile Co.

Thomas R. McNaboe, Mark G. Furey, Portland, Me., for Raymark, Inc.

Randall E. Smith, Saco, Me., for J.P. Stevens & Co.

Robert F. Hanson, Mark G. Lavoie, Portland, Me., for Bath Iron Works Corp.

Paula D. Silsby, Asst. U.S. Atty., Portland, Me., Harold J. Engel, Asst. Dir., S. Michael Scadron, Trial Atty.

and Joseph B. Cox, Jr., Torts Branch, Civil Div., U.S. Dept. of Justice, Washington, D.C., for United States of America.

Peter W. Culley, Stephen C. Whiting, Portland, Me., for Scott Paper Company & Fels Co. & Bendix.

Philip K. Hargesheimer, Roger J. O'Donnell, Platz & Thompson, Lewiston, Me., for Flintkote Co.

Robert E. Heirshon, Portland, Me., for Standard Asbestos Mfg.

SUPPLEMENTAL OPINION AND ORDER OF THE COURT

GIGNOUX, Senior District Judge.

In its opinion and order dated February 23, 1984, the Court granted the motion of the United States to dismiss, or for summary judgment on, all but one of the counts in the third-party complaint for contribution and/or indemnification filed by defendants against the United States (Model Third-Party Complaint B) in each of the asbestos-related actions filed in this Court by present and former employees, and the representatives of deceased employees, at Portsmouth Naval Shipyard (PNS). *See In re All Maine Asbestos Litigation*, 581 F.Supp. 963, 980-81 (D.Me.1984). In that opinion, the Court reserved decision on so much of the United States' motion as sought dismissal of Count VI of Third-Party Complaint B, a count which seeks noncontractual indemnifiation and/or contribution from the United States based upon breach of duties allegedly owed to plaintiffs by the United States in its capacity as the owner of naval vessels at PNS. The Court deferred ruling on this aspect of the United States' motion until disposition of a then pending motion for reconsideration of its opinion in *Austin v. Johns-Manville Sales Corp.*, 508 F.Supp. 313 (D.Me. 1981), a decision upon which the United States had relied heavily in urging dismissal of Count VI of Third-

Party Complaint B. In *Austin*, the Court had held that section 905(a) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 905(a), barred the third-party claims asserted against Bath Iron Works (BIW) by the defendant asbestos manufacturers. *Id.* at 315-16. On March 9, 1984, being persuaded that *Austin* was inconsistent with the subsequent decision of the United States Supreme Court in *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 103 S.Ct. 1033, 74 L.E.2d 911 (1983), the Court vacated its *Austin* decision. *See In re All Maine Asbestos Litigation (BIW Cases)*, 589 F. Supp. 1563, 1570 (D.Me. July 5, 1984) (App. A).

The issues presented by the motion to dismiss Count VI of Third-Party Complaint B have now been fully briefed and argued. The relevant factual background and procedural posture are set out in this Court's previous opinion. *See In re All Maine Asbestos Litigation*, 581 F.Supp. 963. For the reasons to be stated, the Court has concluded that the motion must be denied.

I.

It is undisputed that the PNS employees and deceased employees in these cases were covered by the Federal Employees' Compensation Act (FECA), 5 U.S.C. § 8101 *et seq.*, and that they are barred from suing the United States as their employer by FECA's exclusive liability provision, 33 U.S.C. § 8116(c). In *Lockheed*, the Supreme Court held that "FECA's exclusive liability provision, 5 U.S.C. § 8116(c), does not directly bar a third-party indemnity action against the United States." 460 U.S. at 199, 103 S.Ct. at 1038. Contrary to defendants' contention, however, *Lockheed* did not affirmatively confer upon third parties an indemnity or contribution remedy against the United States.[1] Rather, the Court made clear

[1] Although in *Lockheed* the Supreme Court was concerned only with a third-party indemnity claim, it is clear that the holding is equally applicable to a third-party contribution claim. *See Johns-*

that recourse must be had to the "governing substantive law." *Id.; see Prather v. The Upjohn Co.*, 585 F.Supp. 112, 113 (N.D.Fla. Feb. 15, 1984).

In these cases, jurisdiction over Count VI of Third-Party Complaint B is predicated on the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680. Determination of whether under the governing substantive law defendants may sue the United States for indenmity or contribution in its capacity as a vessel owner at PNS therefore must begin with analysis of the provisions of the FTCA.

II.

The FTCA subjects the United States to liability only "under circumstances where the United States, if a private person, would be liable to the claimant in accordance wtih the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b); *see also* 28 U.S.C. § 2674.[2] The liability of the United States depends upon whether a private person in like circumstances would be liable under state law. *United States v. Muniz*, 374 U.S. 150, 153, 83 S.Ct. 1850, 1852, 10 L.Ed.2d 805 (1963); *Brooks v. A.R. & S. Enterprises, Inc.*, 622 F.2d 8, 10 (1st Cir.1980); *Lambertson v. United States*, 528 F.2d 441, 444 (2d Cir.), *cert. denied*, 426 U.S. 921, 96 S.Ct. 2627, 49 L.Ed.2d 374 (1976). Thus, in determining whether the United States is subject to liability under the FTCA for contribution or indemnity on a theory of vessel-owner negligence, this Court must look to the law

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Manville Sales Corp. v. United States, No. C-81-4561, slip op. at 10, (N.D. Cal. Jan. 6. 1984), *reprinted in Asbestos Litigation Reporter* 7,721, 7,724 (Jan. 20, 1984); *see also Prather v. The Upjohn Co.*, 585 F.Supp. 112, 113 (N.D. Fla. 1984).

[2] Section 2674 provides in relevant part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances.

that a Maine court would apply in analogous circumstances.

III.

The Court agrees with the United States that its status at PNS is analogous to that of a compensation-paying private shipyard employer in Maine. Such an employer would be covered by the Maine Workers' Compensation Act (the Maine Act), 39 Me.Rev.Stat.Ann. § 1 *et seq.* (1978 & Supp.1983-84). Section 4 of the Maine Act, 39 Me.Rev.Stat.Ann. § 4 (Supp.1983-84), as interpreted by the Maine Court, provides a covered employer with immunity from third-party claims for noncontractual contribution or indemnity arising from work-related injuries to its employees. *McKellar v. Clark Equipment Co.*, 472 A.2d 411, 416 (Me.1984); *Roberts v. American Chain & Cable Co.*, 259 A.2d 43, 51 (Me.1969). This Court has recently held that BIW, a compensation-paying private shipyard employer in Maine, is immunized by Section 4 from such third-party suits brought against it as an employer. *In re All Maine Asbestos Litigation (BIW Cases)*, 589 F.Supp. 1563 (D.Me. July 5, 1984). Since the FTCA subjects the United States only to analogous private liability, the United States enjoys the immunity provided by Section 4 of the Maine Act to a compensation-paying private shipyard employer from third-party suits for noncontractual contribution or indemnity brought against it in its capacity as an employer. *See Lambertson v. United States*, 528 F.2d at 444 ("if the state would look to a state . . . statute in determining the liability of a private person for the tort in question, the same statute will be applied in measuring the conduct of the government."); *Prather v. The Upjohn Co.*, 585 F.Supp. at 113-114; *Giannuzzi v. Doninger Metal Products*, 585 F.Supp. 1306 (W.D.Pa.1984); *see also Hess v. United States*, 361 U.S. 314, 315, 319, 80 S.Ct. 341, 343, 345, 4 L.Ed.2d 305 (1960).

Count VI of Third-Party Complaint B does not, however, assert a claim against the United States in its capacity as an employer, but in its capacity as a vessel owner. The authorities are unclear as to whether the immunity granted an employer by a workers' compensation act protects the employer from liability for employee suits brought against it in some other capacity. *See generally* 2A A. Larson, *The Law of Workmen's Compensation* §§ 72.80—72.84 (1983). No Maine authority known to this Court indicates whether the Maine courts would recognize this so-called "dual capacity" doctrine. Consequently, it cannot be known whether section 4 of the Maine Act protects a compensation-paying employer-vessel owner from a third-party suit arising from an injury to an employee and brought against the employer in its capacity as a vessel owner.

IV.

The United States argues that even if section 4 of the Maine Act does not immunize it from third-party claims brought against it as vessel owner, maritime law does not permit the third-party claims here asserted. It makes a rather elegant argument in support of this position, dealing separately with the indemnity and contribution claims.

The United States argues, first, that the claims for noncontractual indemnity will not lie because the plaintiffs in the primary actions seek recovery from defendants for only active fault, while maritime law will award indemnity only to a party passively at fault. *See White v. Johns-Manville*, 662 F.2d 243, 249 (4th Cir.1981); *Glover v. Johns-Manville*, 662 F.2d 225, 229 (4th Cir. 1981).

The United States contends, second, that the claims for contribution cannot be maintained because joint tortfeasor liability is required to support a contribution claim in a

noncollision admiralty case. *See Cooper Stevedoring Co. v. Kopke, Inc.*, 417 U.S. 106, 115, 94 S.Ct. 2174, 2179, 40 L.Ed.2d 694 (1974); *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 44 (3d Cir.1975), *cert. denied*, 423 U.S. 1054, 96 S.Ct. 785, 46 L.Ed.2d 643 (1976). *Cf. Weyerhauser Steamship Co. v. United States*, 372 U.S. 597, 83 S.Ct. 926, 10 L.Ed.2d 1 (1963). It alleges that there can be no joint tortfeasor liability between it and defendants because plaintiffs are barred by section 8116 (c) of FECA from bringing suit against the government in any capacity, including its status as a vessel owner. *See Patterson v. United States*, 359 U.S.. 495, 496, 79 S.Ct. 936, 937, 3 L.Ed.2d 971 (1959); *Johansen v. United States*, 343 U.S. 427, 72 S.Ct. 849, 96 L.Ed. 1051 (1952); *Johnson v. United States*, 402 F.2d 778, 779 (5th Cir.), *cert. denied*, 394 U.S. 930, 89 S.Ct. 1195, 22 L.Ed.2d 459 (1969).

The Court cannot accept the United States' argument. Each aspect of the argument contains a fatal flaw. First, the United States has not shown that the claims asserted by plaintiffs in each of these individual actions are limited to allegations of active fault. The argument that the indemnity claims are barred by the maritime active/passive doctrine is dependent upon such a showing.

Second, the *Johansen/Patterson* line of cases is inapposite to the third-party contribution claims asserted by the defendant manufacturers in these cases. The relevant inquiry under the FTCA must be as to whether a private shipyard employer in Maine would be subject to liability to its employees for negligence in its capacity as a vessel owner. Such a private shipyard would not be protected by the *Johansen/Patterson* doctrine because the shipyard would not be covered by the FECA. Indeed, by reason of section 905(b) of the LHWCA, a private shipyard employer-vessel owner would be subject to liability to its employees for negligence in its capacity as a vessel owner. *Jones & Laughlin Steel Corp. v. Pfeiffer*, 462

U.S. 523, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983). The argument of the United States that defendants' third-party claims for contribution are barred by maritime law because there can be no joint tortfeasor liability between it and defendants therefore fails.

V.

The viability of defendants' third-party claims against the United States in its capacity as a vessel owner thus turns on whether the Maine courts would apply the dual capacity doctrine in these circumstances and hold that section 4 of the Maine Act does not protect a compensation-paying private employer from a third-party claim for noncontractual indemnity or contribution brought against it in its capacity as a vessel owner. Since the Supreme Judicial Court of Maine has not spoken to this question, and courts in other jurisdictions have not been consistent in applying the dual capacity doctrine, *see* 2A A. Larson, *The Law of Workmen's Compensation* §§ 72.80-72.84, the Court deems it appropriate at this time to deny the United States' motion to dismiss Count VI, and, upon its own motion or upon request of a party at the close of trial, to consider certifying the question to the Supreme Judicial Court of Maine pursuant to Me.R. Civ.P. 76B. The Maine Court has made clear that such a certification should be made only on a complete record. *See Hiram Ricker & Sons v. Students International Meditation Society*, 342 A.2d 262 (Me.1975); *White v. Edgar*, 320 A.2d 668 (Me.1974); *In re Richards*, 223 A.2d 827 (Me.1966).

VI.

In accordance with the foregoing, IT IS ORDERED that the United States' motion to dismiss or for summary judgment on Count VI of the Model Third-Party Complaint B is DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
D. MAINE

IN RE ALL MAINE ASBESTOS LITIGATION

Feb. 23, 1984

G. William Higbee, Brunswick, Me., Thomas W. Henderson, Pittsburgh, Pa., William A. Mulvey, Jr., James G. Noucas, Jr., Mark F. Sullivan, Portsmouth, N.H., Lawrence C. Winger, Portland, Me., Melvin I. Friedman, Kriendler & Kriendler, New York City, Dan W. Thornhill, Kittery, Me., Michael P. Thornton, Boston, Mass., for plaintiffs.

Peter L. Murray, Thomas C. Newman, Portland, Me., for Amchem Products, Inc.

Harrison L. Richardson, Jeffrey Thaler, Thomas Getchell, Portland, Me., for Armstrong World.

M. Roberts Hunt, Glenn Robinson, Portland, Me., for Celotex Corp.

C. Alan Beagle, Portland, Me., for Combustion Engineering.

Theodore J. Kurtz, South Paris, Me., for Congoleum.

Frederick C. Moore, Portland, M ., for Cummings Insulation and Claremont Co., Inc.

John R. Linnell, Auburn, Me., for Eagle-Picher Industries.

Thomas Schulten, Portland, Me., for Eastern Refractories.

U. Charles Remmel, Portland, Me., for Fibreboard Corp.

Jack H. Simmons, Lewiston, Me., for Forty-Eight Insulations.

Jothan D. Pierce, Jr., Daniel Emery, Portland, Me., for G.A.F. Corp.

George F. Burns, Portland, Me., for Garlock, Inc.

Phillip D. Buckley, Bangor, Me., for Johns-Manville.

Thomas F. Monaghan, Kevin G. Libby, Deborah J. Ross, Portland, Me., for Keene Corp.

John J. Flaherty, Christopher D. Nyhan, Jonathan S. Piper, Portland, Me., for Nicholet, Inc.

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Peter J. Rubin, Linda Monica, Portland, Me., for Owens-Illinois.

John A. Mitchell, James G. Goggin, Portland, Me., for Pittsburgh Corning.

Charles H. Abbott, Steven Wright, Lewiston, Me., for H.K. Porter Co.

Thomas R. McNaboe, Mark G. Furey, Portland, Me., for Raymark, Inc.

Charles H. Abbott, Steven Wright, Lewiston, Me., for Southern Textile Co.

Randall E. Smith, Saco, Me., for J.P. Stevens & Co.

Robert F. Hanson, Mark G. Lavoie, Portland, Me., for Bath Iron Works Corp.

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Peter W. Culley, Stephen C. Whiting, Portland, Me., for Scott Paper Co.

MEMORANDUM OF OPINION AND ORDER OF THE COURT

GIGNOUX, District Judge.

Presently pending in this Court are approximately 225 actions which have been brought by present and former employees, and the representatives of deceased employees, of either Bath Iron Works (BIW), a private shipyard located in Bath, Maine, or Portsmouth Naval Shipyard (PNS), a government shipyard in Kittery, Maine, against various manufacturers and suppliers of asbestos-containing products. Plaintiffs seek to recover compensatory and punitive damages for injuries the employees allegedly sustained by exposure to and inhalation of asbestos dust during the course of their employment at the shipyards while performing construction or repair work on U.S. naval vessels. The complaints assert causes of action based on negligence, strict liability, and breach of express and implied warranties. Jurisdiction is predicated upon diversity of citizenship. 28 U.S.C. § 1332(a); *Austin v. Unarco Industries, Inc.*, 705 F.2d 1, 3 (1st Cir. 1983).

In addition to denying any liability to the plaintiffs, certain defendants have commenced third-party actions for contribution and/or indemnification against the United States of America. With the Court's approval, defendants have filed Model Third-Party Complaint A in each of the actions filed on behalf of present or former employees at BIW and Model Third-Party Complaint B in each of the actions filed on behalf of present or former employees at PNS. Pursuant to Fed.R.Civ.P. 12(b)(1) and (6) and Fed.R.Civ.P. 56, the United States has filed

motions to dismiss (or, alternatively, for summary judgment on) the defendants' model third-party complaints upon the grounds that this Court lacks subject matter jurisdiction, that the third-party complaints fail to state claims upon which relief can be granted, that there is no genuine issue as to any material fact, and that the United States is entitled to a judgment as a matter of law. The record before the Court consists of the pleadings, depositions, answers to interrogatories, admissions and affidavits on file. The issues have been comprehensively briefed and argued.

In ruling upon the United States' motions to dismiss, the allegations of the third-party complaints must be accepted as true, the complaints are to be liberally construed, and they "should not be dismissed unless it appears that the third-party plaintiffs could 'prove no set of facts in support of [their] claim[s] which would entitle [them] to relief.'" *Jenkins v. McKeithen*, 395 U.S. 411, 421-22, 89 S.Ct. 1843, 1848-49, 23 L.Ed.2d 404 (1969); *Ballou v. General Electric Co.*, 393 F.2d 398, 399 (1st Cir.1968). In ruling upon the United States' motions for summary judgment, all facts are to be construed most strongly in favor of the third-party plaintiffs and all doubts must be resolved in their favor. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962). Summary judgment can be no substitute for trial where there are disputed factual issues, *Walgren v. Howes*, 482 F.2d 95, 98 (1st Cir.1973), and summary judgment may not be granted if there is a "genuine issue as to any material fact." Fed.R.Civ.P. 56(c).

The Court will first consider the United States' motion to dismiss, or for summary judgment on, Model Third-Party Complaint A. The Court will then address the United States' motion to dismiss, or for summary judgment on, Model Third-Party Complaint B.

I.

Model Third-Party Complaint A: BIW Cases

Model Third-Party Complaint A contains nine counts. In the first eight counts, defendants seek indemnity and/or contribution by the United States variously based on its status as a seller of raw asbestos fibers and products containing asbestos (Counts I, II, III), as the promulgator of specifications requiring the use of asbestos products at BIW (Counts IV, V), as the entity in control of the work at BIW (Counts IV, V, VII, VIII), and as the owner of naval vessels at BIW (Count VI). In addition, if it should be determined that admiralty jurisdiction is applicable to the actions, a final count seeks indemnification and/or contribution from the United States on admiralty and maritime law principles (Count IX). Jurisdiction over these claims is asserted under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b) & 2671-2680; the Tucker Act, 28 U.S.C. § 1346(a)(2); and under the general maritime and admiralty jurisdiction of the federal courts, 28 U.S.C. § 1333, the Suits in Admiralty Act, 46 U.S.C. §§ 741-752, the Public Vessels Act, 46 U.S.C. § 781-790, and the Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 740.

The Court will separately discuss each of the nine counts in Third-Party Complaint A.

A. *Count I*

Count I of Third-Party Complaint A seeks noncontractual indemnification and contribution from the United States, as a seller of asbestos to certain of the defendants and to BIW, based upon the government's alleged negligent failure to provide warnings regarding the hazards of asbestos exposure. Count I must be dismissed for lack of subject matter jurisdiction.

The doctrine of sovereign immunity prevents this Court from exercising jurisdiction over a claim against the United States unless the United States has consented to suit on the claim. *Honda v. Clark*, 386 U.S. 484, 501, 87 S.Ct. 1188, 1197, 18 L.Ed.2d 244 (1967). Defendants urge that waiver of the United States immunity from suit on this claim can be found in the FTCA.

The FTCA subjects the United States to liability

> for money damages . . . for . . . personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b); *see also* 28 U.S.C. § 2674.[1] The United States does not deny either that it sold asbestos or that it failed to warn regarding the hazards of asbestos exposure. It contends, however, that Count I alleges conduct for which it cannot be liable by reason of 28 U.S.C. § 2680(a), the discretionary function exception to the government's liability under the FTCA.

Section 2680(a) provides in relevant part that the provisions of the FTCA shall not apply to

> (a) Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

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[1] Section 2674 provides in relevant part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

The leading case interpreting the discretionary function exception is *Dalehite v. United States*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953). In that case the Supreme Court stated:

> The "discretion" protected by the section is not that of the judge—a power to decide within the limits of positive rules of law subject to judicial review. It is the discretion of the executive or the administrator to act according to one's judgment of the best course, a concept of substantial historical ancestry in American law.
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> It is unnecessary to define apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. *It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion.* It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of § 2680 (a) would fail at the time it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion.

346 U.S. at 34, 35-36, 73 S.Ct. at 967-968 (footnotes omitted) (emphasis supplied).

The numerous cases decided since *Dalehite* have not been consistent in determining the types of activities which come within the discretionary function exception. Some general principles have, however, emerged. Thus, some courts have looked to see if the governmental decision required a balancing of such policy factors as the

cost of a program and its potential benefit. *See, e.g., Griffin v. United States*, 500 F.2d 1059, 1064 (3d Cir. 1974). This analysis finds support in the previously quoted statement of the Supreme Court in *Dalehite* that "[w]here there is room for policy judgment and decision there is discretion." 346 U.S. at 36, 73 S.Ct. at 196. Other courts have sought to determine whether the decision was made at a "planning" or at an "operational" level. *See, e.g., Miller v. United States*, 583 F.2d 857, 867 (6th Cir. 1978). This approach emphasizes the finding in *Dalehite* that the exception applied because "[t]he decisions held culpable were all responsibly made at a planning rather than operational level and involved considerations more or less important to the practicability of the Government's fertilizer program." 346 U.S. at 42, 73 S.Ct. at 971. Still other courts have endeavored to look both for a "policy judgment" and a "planning level" decision in determining whether the government's action is protected by the discretionary function exception. *See, e.g., Madison v. United States*, 679 F.2d 736, 739 (8th Cir. 1982); *Blessing v. United States*, 447 F. Supp. 1160, 1167-86 (E.D.Pa. 1978).

The precise issue here presented has been determined by two other courts with conflicting results. In *Stewart v. United States*, 486 F. Supp. 178 (C.D.Ill. 1980), the court held that "the decision to sell the asbestos in unmarked crates to knowledgeable buyers involved a weighing of economic and other policy factors and falls within the discretionary function exception." *Id.* at 184. On the other hand, in *Barlieb v. Turner & Newall, Ltd.*, No. 78-1027 (E.D.Pa. Nov. 26, 1980), the court concluded that the decision to sell the asbestos without warnings did not fall within the discretionary function exception. *Id.*, slip op. at 10.[2]

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[2] In *Shuman v. United States*, No. 78-1407-S (D. Mass. June 23, 1983), slip op. at 7-9, the court held that the allegations of the complaint were sufficient to withstand a motion to dismiss based on the discretionary function exception, but deferred determination

In support of the instant motion, the United States has provided uncontroverted evidence concerning the policy and procedures used by the government in its strategic materials stockpiling program. At the end of World War II Congress determined that it was in the best interests of the United States to stockpile "critical materials being deficient or insufficiently developed [in the United States] to supply the industrial, military, and naval needs of the country for common defense . . . in times of national emergency." Strategic and Critical Materials Stock Piling Act of 1946, Pub. L. No. 79-520, 60 Stat. 596 (codified at 50 U.S.C.A. § 98 *et seq.* (1951)) (the Stock Piling Act).[3] The Stock Piling Act also provided for the rotation of materials in the stockpiles and the disposal of excess materials, the latter requiring the express approval of Congress. Pub. L. No. 79-520, § 3(d), (e), 60 Stat. 596, 597-98 (July 23, 1946). Pursuant to this provision, the government often bought strategic materials in times of scarcity, when prices were high, and sold them in times of plenty, when prices were low. *See* Affidavit of John G. Harlan, Jr., U.S. Ex. 1, ¶ 17 at 9 (the Harlan Affidavit). It is not surprising, then, that the Stock Piling Act provided that

> [t]he plan and date of disposition shall be fixed with due regard to the protection of the United States against avoidable loss on the sale or transfer of the material to be released . . . .

Pub. L. No. 79-520, § 3(e), 60 Stat. 596, 597-98 (July 23, 1946) (codified at 50 U.S.C.A. § 98b(e) (1951)).

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of the applicability of the exception in the case before it until development of a more complete record. The *Shuman* court apparently did not have the benefit of the extensive record presented to this Court in the instant litigation.

[3] The Stock Piling Act was completely revised by the Act of July 30, 1979, Pub. L. No. 96-41, 93 Stat. 319 (codified at 50 U.S.C.A. § 98 *et seq.* (Supp. 1983)). Relevant portions of the Stock Piling Act remained substantially unchanged from 1946 through 1979, the presently relevant time period.

Stockpiles of asbestos were disposed of pursuant to this authority. *See* Harlan Affidavit ¶ 13. Individual legislation authorizing the sale of particular lots of asbestos repeated the language regarding "avoidable loss." *Id.* at ¶ 18; *see, e.g.*, Pub. L. No. 89-422, 80 Stat. 138 (May 11, 1966).

The General Services Administration (GSA) has been charged with administering the disposal of asbestos since 1949. *See* 50 U.S.C.A. 98b(e) (1951); Exec. Order No. 12,155, sec. 1-102, 44 Fed. Reg. 53,071 (1979), *reprinted in* 50 U.S.C.A. § 98 (Supp. 1983).[4] John G. Harlan, Jr., who was a high-level officer in the GSA until his retirement in 1969, and who was connected with the stockpiling programs from 1958 through 1969, relates in his affidavit how the decision to sell each lot of stockpiled asbestos "as is," with no warranties, and without relabeling or repackaging, was arrived at during his tenure:

> The asbestos offered for sale had usually been stockpiled for years. To test, warranty, repackage, or relabel such materials at the time of disposal or to incur avoidable handling . . . expenses would have resulted in avoidable cost to the government. . . . Therefore, the invitation to bids prepared pursuant to my direction and which I approved required that asbestos be sold in the original packaging, with the same markings and in the same condition as it was acquired and stored.
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> With respect to asbestos, . . . we solicited bids only from knowledgeable industry members who regularly used and handled substantial quantities of [it]. . . . We assumed these buyers would be better qualified than our own storage personnel to properly transport, unpackage, handle and use the material in their manufacturing processes.

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[4] From 1946 through 1949 the Bureau of Federal Supply performed this function. *See* 50 U.S.C.A. § 98b, "Historical Note" (1951).

Harlan Affidavit ¶ 19 at 11-12. The procedure described by Harlan for the disposal of asbestos continued after his retirement. *See* Affidavit of Readus B. Long, U.S. Ex. 2, ¶ 5 at 3 (the Long Affidavit). It was not until May 1975 that the GSA changed its policy and began placing caution labels on the asbestos bags. *Id.* at 3-4.

The record before this Court thus establishes that the decision of the United States to sell asbestos without warnings was deliberately made in order to avoid unnecessary costs in implementation of a congressionally authorized program for the disposal of surplus asbestos. The surplus asbestos was sold "as is," with no warranties, no relabeling and no repackaging in order that the asbestos might be sold with the absolute minimum amount of cost. The asbestos was sold without warnings in the belief that the buyers, all knowledgeable members of the industry, were well aware of the risks of asbestos exposure and could best handle the asbestos. The decision to do so was made by a high-level administrator as part of a plan for disposition of surplus asbestos he established by making policy judgments in accordance with legislative direction. This Court concurs with the *Stewart* court that "[i]n these circumstances, where the Government sells a product to a knowledgeable industry buyer, certainly the decision to sell so as to incur the least cost to the Government, *i.e.*, not to incur the cost of warning an experienced and knowledgeable buyer, was a policy consideration and protected by the discretionary function exception." 486 F. Supp. at 185.

Jurisdiction of Count I is barred by the discretionary function exception to the FTCA, 28 U.S.C. § 2680(a).

B. *Count II*

Count II of Third-Party Complaint A is based upon the theory of strict products liability. It seeks noncontractual indemnification and contribution from the United States as a seller of asbestos, which the complaint alleges

to be a defective and unreasonably dangerous product. Defendants argue that jurisdiction over this claim also exists under the FTCA. Again, the Court must disagree.

It is well established that the FTCA subjects the government to liability on claims based on negligent or wrongful conduct, but does not extend to claims based on strict liability. *Laird v. Nelms*, 406 U.S. 797, 798, 92 S.Ct. 1899, 1900, 32 L.Ed.2d 499 (1972); *Dalehite v. United States*, 346 U.S. at 44-45, 73 S.Ct. at 972-973. There is no doubt that the Maine statute upon which Count II is based, 14 M.R.S.A. § 221 (1980), is a strict liability statute. *Adams v. Buffalo Forge Co.*, 443 A.2d 932, 934-44 (Me. 1982). *See Restatement (Second) of Torts* § 402A (1965) and Comment a. Consequently, Count II does not state a claim over which this Court has jurisdiction under the FTCA.

C. *Counts III and IV*

In the third and fourth counts of Third-Party Complaint A, defendants seek contractual indemnification from the United States based upon breach of alleged implied warranties. Jurisdiction over these claims is asserted under the Tucker Act, 28 U.S.C. § 1346(a)(2). Neither of these claims, however, satisfies the jurisdictional requirements of the Tucker Act.

Count III. Count III alleges that the United States breached an implied warranty that asbestos was safe and reasonably fit for its intended purpose, which arose from the sale of raw asbestos and asbestos-containing products by the United States to certain of the defendants and to BIW.

In relevant part, the Tucker Act vests the district courts with jurisdiction of any "claim against the United States, not exceeding $10,000 in amount,[5] founded . . .

[5] In order to avoid the Tucker Act's monetary limitation on the jurisdiction of this Court, defendants have limited the damages

upon any express or implied contract with the United States." 28 U.S.C. § 1346(a)(2). The jurisdiction granted by the Tucker Act with respect to contract claims against the United States extends only to claims arising out of express or implied-in-fact contracts; it does not reach claims on contracts implied in law. *Merritt v. United States*, 267 U.S. 338, 340-41, 45 S.Ct. 278, 279, 69 L.Ed. 643 (1925); *Board of Education v. Bell*, 530 F. Supp. 1130, 1133 (E.D.N.Y. 1982). *See also Hatzlachh Supply Co. v. United States*, 444 U.S. 460, 465 n.5, 100 S.Ct. 647, 650 n.5, 62 L.Ed.2d 614 (1980).

The distinction between a contract implied in fact, over which there is Tucker Act jurisdiction, and a contract implied in law, over which there is no Tucker Act jurisdiction, is well established. An implied-in-fact contract contains all the necessary elements of a binding agreement, but, since its express terms have not been reduced to writing or stated orally, its provisions must be inferred from the intent and course of conduct of the parties. *See Restatement (Second) of Contracts* §§ 4, 19 (1981); 1 A. Corbin, *Corbin on Contracts* § 19 (1963). An implied-in-law contract, a so-called quasi-contract, is not a contract at all, but a legal fiction which enables a court to fashion an equitable remedy to prevent the unjust enrichment of one party at the expense of another. *Id.*

Defendants allege that at the time of sale, the parties had reached "a tacit understanding that the asbestos in question was reasonably safe from a medical standpoint." Yet defendants fail to point to any evidence that the United States represented that asbestos could be used safely in ship construction. To the contrary, the uncontroverted evidence is that the government sold the asbestos "as is" with an express disclaimer of any warranty,

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claimed in each of Counts III and IV to an amount not exceeding $10,000 per plaintiff, plus costs, disbursements and attorneys fees.

express or implied.[6] *See* Harlan Affidavit ¶ 19 at 11; Long Affidavit ¶ 4 at 2-3, and Attachment A, ¶ 2. Thus, it is clear that the type of implied warranty alleged by defendants in Count III, if it exists at all, would have to be one implied in law, since it would in no way depend upon agreement of the parties. *Price Brothers Co. v. Philadelphia Gear Corp.*, 649 F.2d 416, 423 (6th Cir.), *cert. denied*, 454 U.S. 1099, 102 S.Ct. 674, 70 L.Ed.2d 641 (1981); *Carney v. Sears, Roebuck & Co.*, 309 F.2d 300, 303 (4th Cir. 1962). *See* 11 M.R.S.A. § 2-315 (1964). Without any evidence of consent, this Court cannot find a contract implied in fact.

Count III does not state a claim over which this Court has jurisdiction under the Tucker Act.

Count IV. In their fourth claim for relief defendants allege that the United States, by promulgating specifications requiring the use of asbestos in connection with the construction and repair of U.S. naval vessels at BIW, impliedly warranted that the asbestos-containing products sold by defendants for use at the shipyard, which conformed in every respect to the specifications, would not endanger the health and safety of shipyard workers. Defendants' theory is that the specifications themselves created a basis for liability of the United States. In support of this proposition defendants cite a line of cases, originating with *United States v. Spearin*, 248 U.S. 132, 39 S.Ct. 59, 63 L.Ed. 166 (1918).

The *Spearin* line of cases is inapposite to the present litigation. *Spearin* and its progeny support the proposition that under some circumstances detailed government

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[6] Defendants cite *K & M Joint Venture v. Smith Intern., Inc.*, 669 F.2d 1106, 1110 (6th Cir. 1982), for its holding that "the use of 'as is' does not automatically exclude implied warranties." That case is plainly inapposite. In that case the parties had agreed that the products would carry full warranties. The court held only that the seller could not change the terms of this express agreement by adding the term "as is" to the sales invoice.

specifications may create an implied warranty that the specifications are adequate to produce the desired product in a satisfactory manner. *See Ordnance Research, Inc. v. United States*, 221 Ct.Cl. 641, 609 F.2d 462, 479 (1979). This warranty, however, extends only to the party in direct privity with the government. Thus, the *Spearin* court awarded damages resulting from faulty specifications to a building contractor who had contracted directly with the government for the construction of a dry dock. Similarly, *Ordnance Research* concerned the liability of the United States to a manufacturer of explosives which entered into a fixed-price contract with the government to prepare an ignition compound according to a formula provided by the government. By providing detailed instructions for the preparation of the compound, the government warranted that the prescribed safety precautions would be adequate to deal with a volatile compound. If such a warranty were found to exist in the present litigation based upon government procurement specifications requiring BIW to use asbestos products in the construction and repair of naval vessels, it would under these cases run not to the defendant manufacturers, but to BIW, the direct government contractor.

The essential flaw in defendants' argument is that in order to assert a viable contract claim against the United States, defendants must establish privity of contract between themselves and the government. *Correlated Development Corp. v. United States*, 214 Ct.Cl. 106, 556 F.2d 515, 523-25 (1977); *Housing Corp. of America v. United States*, 199 Ct.Cl. 705, 468 F.2d 922, 924 (1972); *D.R. Smalley & Sons, Inc. v. United States*, 178 Ct.Cl. 593, 372 F.2d 505, 507-08 (1967). No contract, express or implied, existed between the United States and the manufacturers who supplied asbestos products to BIW. BIW entered into its own contracts with defendants for the purchase of asbestos-containing products. The United States was not a party to those contracts.

Count IV fails to state a claim which satisfies the jurisdictional requirements of the Tucker Act.[7]

D. *Counts V, VI and VII*

In Counts V, VI and VII of Third-Party Complaint A, defendants seek noncontractual indemnification and/or contribution from the United States based upon alleged acts of negligence committed by the United States in its capacity as the owner of naval vessels at BIW (Count VI); as a "Good Samaritan" (Count VII); and as the promulgator of specifications requiring the use of asbestos products at BIW and as the general supervisor of the work at BIW (Count V). Defendants urge that jurisdiction over these claims exists under the FTCA, or, alternatively, that jurisdiction exists over the claims against the United States in its vessel-owning capacity, under the admiralty jurisdiction of the federal courts.[8]

The Court has concluded that the claims for relief asserted by defendants in these counts do not come within the admiralty jurisdiction of this Court. The Court is persuaded, however, that Count VI, but not Counts V and VII, states a cognizable claim under the FTCA.

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[7] In Count IV defendants appear also to have based their claim for contractual indemnity on an alleged implied warranty that the United States would use due care in overseeing the use of asbestos products at BIW to ensure the health and safety of the workers. Defendants have not pressed this additional contractual claim in either written or oral argument, and the Court is aware of no principle or precedent for the proposition that these allegations, if proven, would form the basis of a claim of implied contractual indemnity.

[8] These alternative jurisdictional bases are mutually exclusive. The FTCA specifically provides that it does not apply to suits in admiralty against the United States. 28 U.S.C. § 2680(d). *See Keene Corp. v. United States*, 700 F.2d 836, 843 n. 11 (2d Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 195, 78 L.Ed.2d 171 (1983).

(a) Admiralty Jurisdiction

Defendants' contention that admiralty jurisdiction exists over the above claims is foreclosed by the recent decision of the United States Court of Appeals for the First Circuit in *Austin v. Unarco Industries, Inc.*, 705 F.2d 1, 8-14 (1st Cir. 1983). The *Austin* case, like the present cases, involved a suit on behalf of a BIW shipyard employee against a manufacturer of asbestos products sold to BIW. The question of whether admiralty jurisdiction is applicable in shipyard asbestos litigation was comprehensively addressed by Chief Judge Coffin in *Austin*. Applying the two-pronged test announced by the Supreme Court in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), Judge Coffin concluded that admiralty jurisdiction was not invoked by shipyard asbestos cases. *Accord Keene Corp. v. United States*, 700 F.2d 836, 843-45 (2d Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 195, 78 L.Ed.2d 171 (1983); *Owens-Illinois, Inc. v. United States District Court*, 698 F.2d 967, 969-71 (9th Cir. 1983). *But see White v. Johns-Manville Corp.*, 662 F.2d 234, 239-40 (4th Cir. 1981), *cert. denied*, 454 U.S. 1163, 102 S.Ct. 1037, 71 L.Ed.2d 319 (1982).[9] Judge Coffin accepted that the plaintiff's claim of being injured while working on a vessel situated in navigable waters—the Kennebec River—met the locality prong of the *Executive Jet* test. But he found that it failed to meet the second prong, which requires that "the wrong bears a significant relationship to traditional maritime activity." *Executive Jet*, 409 U.S. at 268, 93 S.Ct. at 504. In his analysis, Judge Coffin focused on the "activity of the person suffering tortious injury" and concluded that the work performed by an injured shipyard worker is not "traditionally maritime." *Austin*, 705 F.2d at 14.

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[9] In *Shuman v. United States*, No. 78-1407-S (D. Mass. June 23, 1983), the plaintiff conceded that admiralty jurisdiction did not apply under the principles articulated by the Court of Appeals in *Austin*. *Id.*, slip op. at 4-5.

Even though *Austin* was a direct action by the personal representative of a deceased employee against a manufacturer, and the present motions address third-party claims by the manufacturers against the United States, the analysis so carefully developed by Judge Coffin in *Austin* is directly applicable to these proceedings. *Austin* requires the court to examine the "activity of the person suffering tortious injury" to determine whether admiralty jurisdiction exists. In these cases, as in *Austin*, the BIW employees are the persons alleged to have suffered tortious injury from their exposure to defendants' asbestos-containing products. In light of the conclusion in *Austin* that such persons are not engaged in "traditional maritime activity," *Austin* precludes the invocation of admiralty jurisdiction in the present litigation.[10]

(b) FTCA Jurisdiction

Count VI: Alleged Negligence of United States as Vessel Owner. In Count VI of Third-Party Complaint A, which sounds in negligence, defendants seek noncontractual indemnification and/or contribution from the United States based upon breach of duties allegedly owed to plaintiffs by the United States in its status as the owner of U.S. naval vessels at BIW. In support of this claim, defendants assert that the United States maintained a constant presence at BIW and had firsthand knowledge of unsafe working conditions at the shipyard caused by the use of asbestos materials in the construction and repair of naval vessels at the shipyard, but nevertheless failed to warn the BIW employees working on naval vessels in the Kennebec River about, or otherwise protect them from,

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[10] Insofar as Counts V and VII allege a duty owed directly to defendants, it might be argued that "the person[s] suffering tortious injury" are the defendants, rather than the employees The defendants' activities, the manufacture and sale of asbestos containing products, are hardly "traditionally maritime"; thus *Austin* precludes the invocation of admiralty jurisdiction under this analysis as well. *See Keene Corp. v. United States*, 700 F.2d at 844.

the potential dangers of exposure to asbestos.[11] The theory upon which defendants assert liability of the United States under the FTCA is that plaintiffs in these actions are protected by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (LHWCA), and have a right of action under Section 5(b) of that Act, 33 U.S.C. § 905(b), to recover damages from the vessel owner for injury caused by the owner's negligence.[12]

In any action brought under the FTCA, a federal court must apply the "law of the place where the act or omission occurred" (here, Maine), including its choice of law rules. 28 U.S.C. § 1346(b); *Richards v. United States*, 369 U.S. 1, 11-13, 82 S.Ct. 585, 591-593, 7 L.Ed.2d 492 (1962); *Hess v. United States*, 361 U.S. 314, 318 n.7, 80 S.Ct. 341, 345 n.7, 4 L.Ed.2d 305 (1960). The law is clear that Section 5(b) of the LHWCA provides a covered employee's exclusive remedy against a vessel owner. *Hess v. Upper Mississippi Towing Corp.*, 559 F.2d 1030, 1032 (5th Cir. 1977), *cert. denied*, 435 U.S. 924, 98 S.Ct. 1489, 55 L.Ed.2d 518 (1978); *Vogelsang v. Western Maryland Railway Co.*, 531 F.Supp. 11, 13 (D. Md. 1981),

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[11] Count VI includes additional allegations of negligence by the United States as the promulgator of specifications requiring the use of asbestos products and as the general supervisor of work performed at BIW. These claims are substantially identical to the allegations of Count V, which will be considered in the Court's discussion of that count, *post*.

[12] Defendants have also asserted on the same facts that the United States owed plaintiffs duties of care under Maine law in its capacity as the employer of an independent contractor. *See Jenkins v. Banks*, 147 Me. 438, 440, 87 A.2d 908 (1952). *See also Thorne v. United States*, 479 F.2d 804 (9th Cir. 1973); *Restatement (Second) of Torts* §§ 413, 414, 416 & 427 (1977). Given the Court's disposition of the Section 5(b) claim, and given that the liability of a vessel owner under Section 5(b) is probably broader than that of a contractor under state law, *see Johnson v. A/S Ivarans Rederi*, 613 F.2d 334, 345-48 (1st Cir. 1980), *cert. dismissed*, 449 U.S. 1135, 101 S.Ct. 959, 67 L.Ed.2d 325 (1981), the Court need not reach this alternative argument.

affirmed, 670 F.2d 1347 (4th Cir. 1982). Thus, in the context of this litigation, the Maine courts would be bound to apply federal maritime law as embodied in Section 5(b) of the LHWCA in determining the merits of a plaintiff's claim against his vessel owner. *See Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 165-66 n.13, 101 S.Ct. 1614, 1620-21 n.13, 68 L.Ed.2d 1 (1981); *Johnson v. A/S Ivarans Rederi*, 613 F.2d 334, 340 (1st Cir. 1980), *cert. dismissed*, 449 U.S. 1135, 101 S.Ct. 959, 67 L.Ed.2d 325 (1981); *Shuman v. United States*, Civ. No. 78-1407-S (D. Mass. June 23, 1983), slip op. at 3; *Brown v. United States*, Civ. No. H-76-434 (D. Conn. July 23, 1979), slip op. at 5.

Section 5(b) of the LHWCA permits a covered employee [13] who is injured "by the negligence of a vessel" to bring an action for damages "against such vessel as a third party." 33 U.S.C. § 905(b).[14] The United States

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[13] The LHWCA defines an employee under the Act as

> any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker . . . .

33 U.S.C. § 902(3). It is undisputed that the BIW employees and deceased employees in these cases were covered by the LHWCA.

[14] Section 5(b) of the LHWCA provides in relevant part as follows:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. . . . If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection

as the owner of the naval vessels upon which the BIW employees worked comes within the definition of the term "vessel" in Section 2(21) of the LHWCA. 33 U.S.C. § 902(21).[15]

The United States concedes that even though admiralty jurisdiction does not apply to these cases, the FTCA furnishes a jurisdictional basis for defendants' claim against the United States in its capacity as a vessel owner. *See Shuman v. United States*, slip op. at 5; *Brown v. United States*, slip op. at 5-6 n.7. *See also Austin v. Unarco Industries, Inc.*, 705 F.2d at 13; *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 273, 99 S.Ct. 2753, 2762, 61 L.Ed.2d 521 (1979). The United States contends, nevertheless, that Count VI fails to state an actionable claim.

The Supreme Court in *Scindia* defined the Section 5(b) duties owed by a vessel owner to an employee of an independent contractor.[16] In *Scindia* the Court reaffirmed its earlier holding in *Federal Marine Terminals, Inc. v. Burn-*

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shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

33 U.S.C. § 905(b).

[15] Section 2(21) of the LHWCA defines the term "vessel" as

any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crewmember.

33 U.S.C. § 902(21).

[16] The LHWCA itself is silent as to the scope of the vessel's liability under Section 5(b), Congress having left that standard of care to be developed by the courts through the "application of accepted principles of tort law and the ordinary process of litigation." *Scindia*, 451 U.S. at 166 n. 13, 101 S.Ct. at 1621 n. 13 (quoting S.Rep. No. 92-1125, 92d Cong., 2d Sess. 11 (1972)).

side Shipping Co., 394 U.S. 404, 415, 89 S.Ct. 1144, 1150, 22 L.Ed.2d 371 (1969), that the vessel owner owes to such employees "the duty of exercising due care 'under the circumstances.'" 451 U.S. at 166, 101 S.Ct. at 1621. Continuing, the Court stated

> [the] duty extends at least . . . to warning the [employer] of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the [employer] in the course of his . . . operations and that are not known by the [employer] and would not be obvious to or anticipated by him if reasonably competent in the performance of his work. . . . The shipowner thus has a duty with respect to the condition of the ship's gear, equipment, tools, and work space to be used in the [employer's] operations; and if he fails at least to warn the [employer] of hidden danger which would have been known to him in the exercise of reasonable care, he has breached his duty and is liable if his negligence causes injury to [an employee].

451 U.S. at 166-67, 101 S.Ct. at 1621-22 (citations omitted). The Court set forth three tests for determining the liability of a vessel owner: (1) whether the injury was caused by failure of the shipowner to warn of a "hidden danger" on the ship that is known or reasonably should have been known to the shipowner, 451 U.S. at 167, 101 S.Ct. at 1622; (2) whether the injury was caused by conditions under the control of the shipowner, *id.*; (3) whether the injury was caused by failure of the shipowner to intervene when he knows of a dangerous condition and of the employer's failure to correct it, 451 U.S. at 175-78, 101 S.Ct. at 1626-27.[17] *See also Johnson v.*

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[17] The Court declined to adopt the land-based standards of Sections 343 and 343A of the *Restatement (Second) of Torts* in construing Section 5(b) of the LHWCA. 451 U.S. at 168 n. 14, 101

A/S Ivarans Rederi, 613 F.2d at 348; *Ryder v. United States*, 513 F. Supp. 551, 557 (D. Mass. 1981).

Defendants allege in Count VI that the United States, as the owner of naval vessels at BIW and as the general supervisor of the work performed on board its vessels, breached its duty to plaintiffs by negligently failing to provide warnings regarding "the latent and hidden perils" posed by the asbestos materials used in the construction and repair of the vessels and by negligently failing to intervene to protect plaintiffs from the risks, of which the United States was aware, posed by exposure to asbestos. Pursuant to the teaching of *Scindia*, these allegations state a cognizable claim under Section 5(b) of the LHWCA. *See Schuman v. United States; Brown v. United States.* They are sufficient to withstand the United States' motion to dismiss.

Moreover, the record before the Court at this time raises triable issues of fact regarding the existence and breach by the United States of the duty of due care allegedly owed by it as vessel owner to BIW and its employees. The disputed factual questions which cannot be resolved on this record include: whether the United States knew or should have known of a hidden danger from asbestos exposure which was unknown to the shipyard workers; the degree of active control of the vessels exercised by the United States during the construction and repair operations; whether warnings were in fact given by the United States and, if given, to whom were they given and were they timely and adequate; and, finally, whether, in all the circumstances, the United States exercised reasonable care to protect plaintiffs from the dangers associated with their exposure to asbestos in constructing and repairing U.S. naval vessels. These disputed issues of material fact, as to which the parties have

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S.Ct. at 1622 n. 14. Until *Scindia* there had been a split among the circuits as to the applicability of Sections 343 and 343A. *See Ryder v. United States*, 513 F.Supp. 551, 557 n.10 (D. Mass. 1981).

presented conflicting documentary evidence, render summary judgment inappropriate.

As to the claims asserted by defendants in Count VI of Third-Party Complaint A against the United States in its capacity as a vessel owner, the government's motion to dismiss or for summary judgment must be denied.

Count VII: (Alleged Negligence of the United States as a "Good Samaritan"). In Count VII of Third-Party Complaint A, defendants seek noncontractual indemnification and/or contribution from the United States pursuant to the Good Samaritan doctrine. In support of this claim, defendants allege that by undertaking to conduct studies, surveys and experiments designed to protect the health and safety of asbestos workers, who relied on the United States' actions to their detriment, the United States assumed a duty to provide warnings and otherwise exercise reasonable care to protect those workers. Defendants further charge that the United States breached its duty of care by failing to provide warnings of, or otherwise to protect the workers from, the hidden dangers of asbestos exposure.

Under the Good Samaritan doctrine, "one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner." *Indian Towing Co. v. United States*, 350 U.S. 61, 64-65, 76 S.Ct. 122, 124-125, 100 L.Ed. 48 (1955); *Zabala Clemente v. United States*, 567 F.2d 1140, 1145 (1st Cir.), *cert. denied*, 435 U.S. 1006, 98 S.Ct. 1876, 56 L.Ed.2d 388 (1978); *Restatement (Second) of Torts* §§ 323, 324A (1965). The Good Samaritan doctrine is recognized by federal maritime law. *See, e.g., Indian Towing Co. v. United States; Zabala Clemente v. United States; Patentas v. United States*, 687 F.2d 707, 714 (3d Cir. 1982). And, although the Maine courts have not addressed the Good Samaritan doctrine, there is little doubt that they would adopt this generally accepted doctrine as set forth in *Indian Towing* and the *Restate-*

ment.[18] *See Hill v. Day*, 108 Me. 467, 471, 81 A. 581 (1911); *Brawn v. Lyford*, 103 Me. 362, 365, 69 A. 544 (1907).

In order to sustain a Good Samaritan claim under *Indian Towing* and the *Restatement*, the defendants in these actions must show: (1) an undertaking by the United States to protect the health and safety of workers coming into contact with asbestos during shipbuilding and repair; (2) negligence of the United States in discharging that undertaking; and (3) one of the following additional elements:

(a) The harm was suffered because of the plaintiffs' reliance upon the United States' undertaking; or

(b) The United States' negligent performance of its undertaking increased the risk of harm to the plaintiffs; or

(c) The United States undertook to perform a duty owed to the plaintiffs by another entity, in this case BIW.

See generally Indian Towing Co. v. United States, 350 U.S. at 69, 76 S.Ct. at 126; *Zabala Clemente v. United States*, 567 F.2d at 1145; *Restatement (Second) of Torts* §§ 323, 324A (1965).

Defendants allege in Count VII that "by virtue of having undertaken to act and pursue a course of conduct, pursuant to statute, regulation or otherwise, involving the study of the potential dangers, hazards and risks of exposure to asbestos, and further involving efforts to pro-

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[18] As defendants point out, the Maine Law Court frequently applies the provisions of the *Restatement* in the absence of controlling precedent when applying the common law of Maine. *See, e.g., Vicnire v. Ford Motor Credit Co.*, 401 A.2d 148, 154 (1979); *Letellier v. Small*, 400 A.2d 371, 375 (Me. 1979); *Nelson v. Maine Times*, 373 A.2d 1221, 1223-25 (Me. 1977); *Jones v. Billings*, 289 A.2d 39, 42-43 (Me. 1972).

tect the health, safety and welfare of asbestos workers, the USA owed and/or assumed a duty of care to the defendant/third-party plaintiffs and to all asbestos workers, including plaintiffs, who relied upon the USA's actions to their detriment." Count VII further alleges that the United States breached its duty of care by failing to enforce regulations and procedures relating to asbestos exposure and by failing to provide warnings about the potential dangers posed by asbestos products used in the construction and repair of U.S. naval vessels. These allegations sufficiently state the essential elements of a Good Samaritan claim so as to prevent the granting of the United States' motion to dismiss.

The United States' motion for summary judgment must, however, be granted. The affidavits and other documentation submitted by the parties disclose no more than that the government conducted studies, surveys and experiments concerning the medical effects of asbestos exposure, issued minimum health and safety requirements to contract shipyards and monitored the shipyards' compliance with these requirements through the use of onsite Navy inspectors. There is no indication in the record that BIW employees were even aware of or justifiably relied for their safety on these activities of the United States. Such conduct is insufficient as a matter of law to create an affirmative duty of care between the federal government and the employees of an independent contractor. *Ramos Perez v. United States*, 594 F.2d 280, 287-90 (1st Cir. 1979); *Zabala Clemente v. United States*, 567 F.2d 1140 (1st Cir.), *cert. denied*, 435 U.S. 1006, 98 S.Ct. 1876, 56 L.Ed.2d 388 (1978); *Kirk v. United States*, 270 F.2d 110, 117-18 (9th Cir. 1959). *But see S.A. Empresa de Viacao Aerea Rio Grandense v. United States*, 692 F.2d 1205, 1207-08 (9th Cir. 1982), *cert. granted*, —— U.S. ——, 103 S.Ct. 2084, 77 L.Ed.2d 296 (1983); *United Scottish Insurance v. United States*, 692 F.2d 1209 (9th Cir. 1982), *cert. granted*, —— U.S. ——, 103 S.Ct. 2084, 77 L.Ed.2d 296 (1983). The implementa-

tion of various safety control measures, whether pursuant to statute, regulation, or as a matter of policy, does not constitute an undertaking which would oblige the government to insure the safety of all shipyard workers who might benefit from these regulations. While the defendants assert that the actions of the United States were "far more encompassing than mere safety regulations," the type of conduct found in the record fails to establish a direct relationship between the government and asbestos workers such that the United States can be said to have assumed ultimate responsibility for the health of those workers. *See Roberson v. United States*, 382 F.2d 714, 720-21 (9th Cir. 1967). On the present record, the government has established that there is "no genuine issue as to any material facts" and that therefore it "is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The United States' motion for summary judgment on Count VII of Third-Party Complaint A must be granted.

Count V: (Alleged Negligence of the United States as Promulgator of Specifications and as General Supervisor of Work at BIW). In Count V of Third-Party Complaint A, defendants seek non-contractual indemnification from the United States based upon breach of a duty allegedly owed by the United States *directly to defendants* to exercise reasonable care to provide for the safety of workers at BIW and other private shipyards who were engaged in the construction and repair of U.S. naval vessels, to provide warnings to such workers concerning the potential dangers of exposure to asbestos, to promulgate specifications for thermal insulation and other products which were safe and could be used in a safe manner, and to assure that the thermal insulation and other products provided by defendants to BIW and other private shipyards were not used in a fashion which would endanger the health and safety of the shipyard workers.

Defendants contend that the duty allegedly owed by the United States to defendants which underlies the indemnification claim in Count V arose as a result of a "unique relationship" between the United States and defendants in the development of asbestos insulation products for use in the construction and repair of naval vessels. This unique relationship is said to result from the joint endeavors of the United States and the asbestos industry over a period of four decades in developing asbestos-containing thermal insulation products suitable for use by the Navy.

Defendants have cited absolutely no authority for the novel theory of indemnification asserted in Count V, and the Court is not aware of any case law or principle that supports the proposition advanced by defendants in this count. Count V will be dismissed for failure to state a cognizable claim against the United States.

E. *Count VIII*

In Count VIII of Third-Party Complaint A, defendants seek noncontractual indemnification and/or contribution from the United States based upon breach by the United States of a duty allegedly owed to plaintiffs to provide warnings regarding the potential dangers of exposure to tobacco smoke in general and in conjunction with exposure to products containing asbestos.

Defendants state that Count VIII simply realleges all their prior claims and does no more than expand the scope of the United States' alleged duty to warn to include an obligation to provide information about the synergistic effect of asbestos and tobacco. Because Count VIII includes no substantive allegation which is not incorporated in other counts, Count VIII will be stricken as redundant. *See* Fed. R. Civ. P. 12(f).[19]

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[19] Defendants properly concede that Count VIII does not seek to impose liability on the United States on the basis of the Surgeon

F. *Count IX*

Count IX of Third-Party Complaint A repeats and reiterates all prior claims for relief, and alternatively alleges admiralty jurisdiction as the jurisdictional basis for those claims. Since the Court has concluded that admiralty jurisdiction is not applicable to these cases, Count IX must be dismissed.

II.

Model Third-Party Complaint B: PNS Cases

Model Third-Party Complaint B also contains nine counts. Each count is virtually identical to the corresponding count in Third-Party Complaint A and the same jurisdictional bases are asserted.[20] The only factual difference between the BIW cases and the PNS cases is that in the former the injured shipyard workers were employed by BIW, a private shipyard, whereas in the latter the injured workers were employed by PNS, a government shipyard. This distinction, however, does not affect the rationale which has led this Court to conclude that Counts I, II, III, V, VII, VIII and IX of Third-Party Complaint A must be dismissed. The government's motion to dismiss or for summary judgment on the corresponding counts in Third-Party Complaint B will therefore be granted. Counts IV and VI of Third-Party

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General's failure to release information to the general public concerning the increased hazards of combined exposure to asbestos and tobacco smoke. *See, e.g., Gercey v. United States*, 540 F.2d 536, 539 (1st Cir. 1976), *cert. denied*, 430 U.S. 954, 97 S.Ct. 1599, 51 L.Ed.2d 804 (1977); *Gelley v. Astra Pharmaceutical Products, Inc.*, 610 F.2d 558, 562-63 (8th Cir. 1979).

[20] The Court notes, however, that defendants have added to the claims asserted in Counts VI and VIII of Third-Party Complaint B an allegation that the United States negligently failed to provide plaintiffs with warnings about the potential dangers of asbestos exposure subsequent to the time that plaintiffs terminated their employment with the government.

Complaint B are the only counts requiring further discussion.

Count IV.

In Count IV of Third-Party Complaint B, defendants allege that the United States, by promulgating specifications requiring the use of asbestos on naval vessels constructed and repaired at PNS, impliedly warranted that the asbestos-containing products sold by defendants for use at the shipyard, which conformed in every respect to the specifications, would not endanger the health and safety of shipyard workers. Defendants' theory is that the specifications themselves create a basis for liability of the United States, of which this Court has jurisdiction under the Tucker Act, 28 U.S.C. § 1346(a)(2). The Court must disagree.

In support of Count IV, defendants rely on *United States v. Spearin*, 248 U.S. 132, 39 S.Ct. 59, 63 L.Ed. 166 (1918), and its progeny, including *Ordnance Research, Inc. v. United States*, 221 Ct. Cl. 641, 609 F.2d 462 (1979). This line of cases stand for the proposition that "[w]hen the government issues design specifications of a detailed nature . . . it warrants the sufficiency and efficacy of those specifications to produce the desired product in a satisfactory manner." *Ordnance Research, Inc. v. United States*, 609 F.2d at 479 (citations omitted). The *Spearin* line of cases addresses government contracts entirely different from those involved in the PNS cases. First, in those cases a private entity was required to comply with detailed government specifications in performing a contract with the government. In these cases, the entity performing pursuant to the detailed specifications was the government itself, not a private contractor. If any warranty such as that alleged by defendants were found to exist, it could run only from the government to itself. Second, in the PNS cases, the only relationship between defendants and the government arose when the government, as owner of the shipyard, purchased from

defendants asbestos products complying with military specifications. It is well established that a vendor/vendee relationship creates no implied agreement by the buyer to indemnify the seller for injuries resulting from the use of the purchased product. *In re General Dynamics Asbestos Products*, 539 F. Supp. 1106, 1110-12 (D. Conn. 1982); *Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714, 723 (2d Cir. 1978); *White v. Johns-Manville Corp.*, 662 F.2d 243, 248 (4th Cir. 1981).

Count IV fails to state a viable claim under the Tucker Act.

Count VI

In Count VI of Third-Party Complaint B, defendants seek noncontractual indemnification and/or contribution from the United States based upon breach of duties allegedly owed to plaintiffs by the United States in its status as the owner of naval vessels at PNS. In support of its motion to dismiss this count, the United States relies heavily on *Austin v. Johns-Manville Sales Corp.*, 508 F. Supp. 313, 315-16 (D. Me. 1981), where this Court held that Section 5(a) of the LHWCA, 33 U.S.C.A. § 905(a), barred third-party claims for contribution asserted against BIW by the defendant asbestos manufacturers.

In opposition to the government's motion to dismiss Count VI, defendants argue that this Court's interpretation of Section 5(a) of the LHWCA in *Austin*, is inconsistent with the Supreme Court's recent decision in *Lockheed Aircraft Corp. v. United States*, —— U.S. ——, 103 S.Ct. 1033, 74 L.Ed.2d 911 (1983). In *Lockheed* the Court held that third-party claims were not barred by Section 8116(c) of the Federal Employee's Compensation Act, the language of which is identical to Section 5(a) of the LHWCA. Defendant Raymark Industries, Inc. has filed with this Court a motion for reconsideration of its *Austin* ruling. The motion for reconsideration has been

fully briefed and will be assigned for oral argument in the near future. Because of the interrelationship between Raymark's motion for reconsideration of the *Austin* decision and the United States' motion to dismiss Count VI of Third-Party Complaint B, the Court will reserve decision on this aspect of the instant motion. The matter will be assigned for further briefing and oral argument after the Court's disposition of the motion for reconsideration of *Austin*.

III.

Order

In accordance with the foregoing, it is

ORDERED as follows:

(1) That the motion of the United States to dismiss, or for summary judgment on, Counts I, II, III, IV, V, VII, VIII and IX of Model Third-Party Complaint A is GRANTED;

(2) That the motion of the United States to dismiss, or for summary judgment on, Count VI of Model Third-Party Complaint A is DENIED.

(3) That the motion of the United States to dismiss, or for summary judgment on, Counts I, II, III, IV, V, VII, VIII and IX of Model Third-Party Complaint B is GRANTED;

(4) That decision is RESERVED on the motion of the United States to dismiss, or for summary judgment on, Count VI of Model Third-Party Complaint B.

APPENDIX D

UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

Nos. 84-2033, 84-2034

MILDRED V. DRAKE,
Plaintiff, Appellee,

v.

RAYMARK INDUSTRIES, INC., *et al.*,
Defendants and Third-Party Plaintiffs, Appellants.

MILDRED V. DRAKE,
Plaintiff, Appellee,

v.

RAYMARK INDUSTRIES, INC., *et al.*,
Defendants and Third-Party Plaintiffs, Appellees,

BATH IRON WORKS CORPORATION,
Third-Party Defendant, Appellant.

Argued April 3, 1985

Decided Aug. 27, 1985

Mark G. Furey, Portland, Me., with whom Thomas R. McNaboe, Thompson, McNaboe & Ashley, Bernstein, Shur, Sawyer & Nelson, Hunt, Thompson & Bowie, Ver-

rill & Dana, Portland, Me., and Skelton, Taintor, Abbott & Orestis, Lewiston, Me., were on brief, for Raymark Industries, Inc.

Robert F. Hanson, Portland, Me., with whom James D. Poliquin and Norman & Hanson, Portland, Me., were on brief, for Bath Iron Works Corp.

Before CAMPBELL, Chief Judge, BOWNES and TORRUELLA, Circuit Judges.

BOWNES, Circuit Judge.

This is an appeal from a summary judgment granted third-party defendant-appellee Bath Iron Works Corporation (BIW or Shipyard) on claims against it for contribution or indemnity by defendants and third-party plaintiffs-appellants Raymark Industries, Inc. and other manufacturers and distributors of asbestos products.

I. BACKGROUND

This is one of approximately fifty cases brought in the District Court of Maine by present and former employees of BIW, or the representatives of their estates, against a large number of manufacturers and suppliers of asbestos products. BIW is in the shipbuilding and ship repair business. The complaints in the primary actions seek compensatory and punitive damages for injuries the employees of BIW allegedly sustained from exposure to appellants' products during the course of their employment at the Shipyard.

With the approval of the district court, the defendants-appellants filed a Model Third-Party Complaint against BIW in each of the actions against them. The case at bar tests the soundness of the district court's ruling on motion for summary judgment that none of the six counts of the Model Third-Party complaint could be maintained. We restate the allegations in the complaint *seriatim*.

Count I alleges that BIW knew or should have known that the material it purchased for use in the construction and/or repair of ships included asbestos and products containing asbestos, and that its employees would come into contact with such materials; that BIW knew or should have known that working with asbestos and products containing asbestos posed unreasonable health dangers unless adequate precautionary measures were taken; that BIW wantonly, recklessly and negligently failed to exercise due care vis-a-vis its employees in ten specific ways; that any damages to plaintiffs were caused by BIW; that any judgment against the defendants should be reduced by the amount of BIW's workers' compensation lien under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) or, in the alternative, the defendants are entitled to a judgment against BIW in the amount of such liens. Defendants also seek declaratory relief that BIW be ordered to pay directly to them any future workers' compensation benefits to which the plaintiffs became entitled.

Count II seeks contribution or indemnity for any punitive damage judgments for the plaintiffs.

Count III alleges that the construction of and/or repair of ships involving asbestos and products containing asbestos were inherently dangerous activities; that defendants had no control over the products sold once they were in the possession of BIW; that BIW owed defendants a duty, independent of any duty to its employees, not to use asbestos and products containing asbestos in such a willful, wanton, reckless or negligent manner as to make them unreasonably hazardous to BIW employees or other persons; that defendants' products were not dangerous to BIW employees if used with due care; that defendants are entitled to be indemnified by BIW to the full extent of any judgments against them or, in the alternative, to the extent of BIW's workers' compensation liens.

Count IV alleges a claim for contribution for any damages for consequential and punitive damages recovered by plaintiffs against defendants, including loss of consortium.

Count V alleges that BIW had a duty to provide medical examinations, diagnosis, and treatment for the illness of its employees; that BIW's medical personnel wantonly, recklessly and negligently failed to perform their duties; that such failure caused or aggravated the asbestos-related diseases of the employees; that defendants are entitled to contribution and indemnification by BIW for any judgments against them or, in the alternative, to indemnification to the extent of BIW's workers' compensation lien.

Count VI alleges that BIW was the owner or owner *pro hac vice* of the vessels upon which its employees worked within the meaning of 33 U.S.C. § 902(21); that BIW acted willfully, wantonly, recklessly and negligently as owner or owner *pro hac vice*; that BIW's conduct was the proximate cause of the damages claimed by plaintiffs; that under 33 U.S.C. § 905(b), BIW is liable to plaintiffs for all damages claimed in their complaints against defendants.

With one exception, all of the claims for contribution and/or indemnity are based on alleged breaches of duty by BIW to its employees. The exception is paragraph 19 of Count III which states in pertinent part: "BIW owed defendants a duty, independent of any duty it owed its employees, not to employ" the asbestos materials so as to make them unreasonably dangerous to the employees or others. Defendants failed to state whether the alleged duty is based on tort or contract. Nor did they allege the existence of an express or implied contract between BIW and the defendants regarding the use of asbestos material. The defendants, then, "are asking us to hold a user liable to a manufacturer for the former's negligent use of the latter's defective product." *Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714, 723 (2d Cir. 1978) (Friendly,

J.). Like the Second Circuit, "[t]his we decline to do." *Id.*; *cf.* 2A Larson, The Law of Workmen's Compensation § 76.84 at 14-746 (1985) ("But when a purchaser buys a product, does he make an implied contract with the manufacturer to use the goods in such a way as not to bring liability upon the manufacturer? This would be stretching the concept of contract out of all relation to reality."). The district court did not expressly rule on this claim, probably because it was not pressed below. Certainly, the defendants have not adverted to it at all in their brief to this court. Given these circumstances, we consider this claim to have been dropped but, in any event, we rule that it must be dismissed for failure to state a cause of action upon which relief can be granted. The basis of liability for defendants' third-party action is, therefore, grounded solely on BIW's alleged breach of duties to its employees.

The district court rendered three separate opinions. On Counts I through V, which we shall refer to as the land-based or nonmaritime claims, the court granted summary judgment for BIW, excepting only those claims for *pro tanto* indemnification. 589 F. Supp. 1563 (D. Me. 1984). The court based its ruling on the grounds that the exclusivity provision of the Maine Workers Compensation Act (MWCA), Me. Rev. Stat. Ann. tit. 39, § 4 (1978 and Supp. 1983-84), had been interpreted by the Maine Supreme Judicial Court to bar all noncontractual rights of contribution and indemnity. *McKellar v. Clark Equipment Co.*, 472 A.2d 411, 416 (Me. 1984); *Roberts v. American Chain & Cable Co., Inc.*, 259 A.2d 43, 51 (Me. 1969). In a subsequent opinion, the district court granted summary judgment for BIW on the *pro tanto* claims.

> Because no benefits have been paid to Forrest Drake, his widow or his dependents under the Maine Workers' Compensation Act, and BIW and its insurer have waived any workers' compensation lien under

the LHWCA, there is no predicate for the *pro tanto* relief sought by defendants against BIW in their third-party complaints.

On Count VI the district court held "that BIW was not during the relevant periods the owner *pro hac vice* of vessels being constructed or repaired in its yard and that the cause of action asserted in Count VI of R-M's third-party complaints is therefore barred by Section 905(a) of the LHWCA."

We shall review first the district court's disposition of Count VI, for contribution based on the alleged negligence of the BIW *qua* shipowner vis-a-vis the injured employees. We then evaluate the court's disposition of the land-based claims. Our ultimate conclusion is the same as the district court's—that none of the counts contained in the model third-party complaint can withstand a motion for summary judgment—although we reason to that conclusion via a different route.

II. THIRD-PARTY LIABILITY AS A SHIPOWNER UNDER § 905(b)

In Count VI of their Model Third-Party Complaint, defendant manufacturers press a claim against Bath Iron Works for shipowner negligence, purportedly based on the Longshore and Harbor Workers' Compensation Act [1] (LHWCA or Longshore Act), 33 U.S.C. § 905(b). Defendants correctly claim that determinations regarding the viability of § 905(b) negligence claims are governed by federal maritime principles. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed. 2d 768 (1983); *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, at 165 n. 13, 101 S.Ct. 1614 at

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[1] Congress has modified the name of the Act by changing "Longshoremen" to "Longshore." *See* Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 27(d).

1621 n. 13, 68 L.Ed. 2d 1 (1981). Turning to the statute, the pertinent language reads as follows:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then *such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel* as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void.

33 U.S.C. § 905(b) (emphasis added).

In the case before us, the injured employee's representative did not bring an action against BIW as shipowner *pro hac vice*, or against any other shipowner; she filed no § 905(b) action whatsoever. Instead, she filed strictly nonmaritime, state causes of action against the various asbestos product manufacturers and suppliers based on Maine law and grounded on diversity jurisdiction. Her claims involved strict liability, breach of warranty and negligence. Despite the nonmaritime nature of these primary claims, defendants seek to assert § 905(b) as a basis for indemnity or contribution [2] from BIW, which by its terms confers authority to bring a shipowner negligence action upon the injured employee or his/her representative, and the employer as statutory assignee. *See* 33 U.S.C. § 933(b); *Rodriguez v. Compass Shipping Co.*,

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[2] Defendants allege no contractual basis for indemnity but only noncontractual indemnity. As the noncontractual indemnity here appears to be based upon tort theory, *see Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714, 718 (2d Cir. 1978), and is in effect only a more extreme form of contribution, *see id.*, we shall refer henceforth only to defendants' right to contribution. Clearly, if defendants have no right to partial contribution based on applicable tort principles, they have no right to indemnification of the whole of their damages based on those same tort principles.

Ltd., 451 U.S. 596, 101 S.Ct. 1945, 68 L.Ed.2d 472 (1981).

Although contribution has a long and venerable history in admiralty and maritime affairs, *see Cooper Stevedoring Co. v. Kopke*, 417 U.S. 106, 94 S. Ct. 2174, 40 L.Ed. 2d 694 (1974); *see generally* Staring, *Contribution and Division of Damages in Admiralty Cases*, 45 Calif.L.Rev. 304 (1957), we doubt whether a contribution action premised solely upon § 905(b) can proceed without having as its predicate a § 905(b) primary action properly brought by one of the parties authorized by the statute. Especially in a situation such as this, where the primary action is based on distinctly nonmaritime rights and duties—duties owed by any manufacturer of a product later determined to be defective and which bear no significant relationship to maritime commerce—it seems that defendants cannot use § 905(b) as a source of a right to contribution from a shipowner or owner *pro hac vice*. Our study of the decisional law failed to uncover any cases where § 905(b) was allowed to be asserted as the basis for liability in a third-party action where it was not sued upon in a primary action. We note, however, that the parties did not raise or brief this question. We therefore shall bracket this question and assume *arguendo* that defendants are not barred from bringing a contribution action based on the plaintiff's omission of a § 905(b) claim in her action.

Appellee BIW contends that defendants' § 905(b) action cannot be maintained because the injury allegedly caused by BIW's dereliction of duty as a shipowner *pro hac vice* was not a maritime tort, which is a fundamental requirement for an injury to be cognizable under § 905(b). The appellants respond by arguing that an independent basis for admiralty jurisdiction need not be shown to redress an injury under the section; all that is required is satisfaction of the literal words of the

statute, which does not so much as mention the words "maritime tort" or "admiralty jurisdiction."

The question before us, then, is: does § 905(b) recognize only maritime torts, *i.e.*, torts cognizable in admiralty (regardless of the actual basis of jurisdiction, such as diversity), or does its range encompass nonmaritime torts occurring *on* a vessel but where the tests for admiralty jurisdiction are not satisfied? After careful study, we think the scope of § 905(b) is limited to maritime torts. To explain our conclusion, we must examine the definition of the term "maritime tort," retrace the origin of § 905(b) in the warranty of seaworthiness, and demonstrate why the alternative conclusions about the scope of § 905(b) that have been advanced fail to accord with logic, the legislative history of the section, and the admiralty "traditions of simplicity and practicality." *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 631, 79 S.Ct. 406, 410, 3 L.Ed.2d 550 (1959); *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575, 22 L.Ed. 654 (1874).

A. *Maritime Tort*

It is elementary, almost axiomatic, that maritime torts are those which fall within the admiralty jurisdiction or satisfy the tests for the application of admiralty law. *Executive Jet Aviation v. Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), makes this point plainly: "[d]etermination of the question whether a tort is 'maritime' *and thus* within the admiralty jurisdiction of the federal courts . . . ." *Id.* at 253, 93 S.Ct. at 497 (emphasis added); *see also Victory Carriers, Inc. v. Law*, 404 U.S. 202, 204, 92 S.Ct. 418, 420, 30 L.Ed.2d 383 (1971). The Court in *Executive Jet* began its analysis of the proper scope of maritime tort jurisdiction from this premise, and rejected the traditional dependence of the determination solely upon the "locality of the wrong." *Id.* The Court concluded that a showing of a "relation-

ship of the wrong to traditional maritime activity is often more sensible and more consonant with the purposes of maritime law than is a purely mechanical application of the locality test." *Id.* 409 U.S. at 261, 93 S.Ct. at 501; *see also Austin v. Unarco Industries, Inc.*, 705 F.2d 1 (1st Cir.), *cert. dismissed*, 463 U.S. 1247, 105 S.Ct. 34, 77 L.Ed.2d 1454 (1983). In *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 673, 102 S.Ct. 2654, 2657, 73 L.Ed.2d 300 (1982), the Court held that this two-pronged situs and status test must be met in all actions sought to be governed by admiralty law.

Before *Executive Jet*, then, to be classified as a maritime tort the wrong had to fall within admiralty jurisdiction, which in turn required only that the wrong occur or take effect on navigable waters. *Foremost Insurance*, 457 U.S. at 672, 102 S.Ct. at 2657; *Kermarec v. Compagnie Generale*, 358 U.S. at 628, 79 S.Ct. at 408; *Williams v. Avondale Shipyards, Inc.*, 452 F.2d 955, 958-59 (5th Cir.1971). One special maritime tort action, the strict liability unseaworthiness action for stevedores and other shorebased maritime workers, however, required that additional elements besides admiralty jurisdiction be satisfied. To fasten liability without fault onto a vessel and its owners, the courts also required that the vessel be "in navigation," *Waganer v. Sea-Land Service, Inc.*, 486 F.2d 955, 958 (5th Cir.1973); *see also Williams v. Avondale*, 452 F.2d at 957; G. Gilmore & C. Black, The Law of Admiralty 441 (1975), and that the injured worker or his work group be engaged in traditional "ship's work," not some land-based specialty work. *West v. United States*, 361 U.S. 118, 122, 80 S.Ct. 189, 192, 4 L.Ed.2d 161 (1959); *United Pilots Association v. Halecki*, 358 U.S. 613, 79 S.Ct. 517, 3 L.Ed.2d 541 (1959).

The unseaworthiness action, despite its strictures, engendered a vast amount of litigation and imposed great costs upon stevedore employers and shipowners, which resulted in congressional abolition of it through the pas-

sage of § 905(b). We briefly review the genesis and history of the unseaworthiness action before turning to examine the legislative history of § 905(b) and the other 1972 Amendments to the LHWCA.

B. *Unseaworthiness*

Almost twenty years after the original passage of the Longshore Act, the Supreme Court was confronted with a case where a stevedore, injured when a ship's winch and boom broke, sought to sue the ship and its owner for damages. The Court held that the ship's obligation of seaworthiness, traditionally owed by ships to seamen, extend to a stevedore who was injured while aboard the vessel and incurring seamen's hazards. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946). The unseaworthiness claim so authorized omitted any requirement that a shipowner's negligence or fault in causing the injury be proven. In *Sieracki*, the Court stated that its holding did not conflict with the Longshore Act because the LHWCA did not foreclose personal injury actions under general admiralty law except against the employer. *Id.* at 101, 66 S.Ct. at 880. Commentators have since suggested that *Sieracki* was a direct result of the failure of Congress to improve the paltry compensation payable under the LHWCA and raise the incentive for safety in the shipping industry. G. Gilmore & C. Black, The Law of Admiralty at 446-48.

Ten years later, with "*Sieracki*-seamen" suits flourishing with a seemingly inequity. The absolute nondelegable seaworthiness warranty imposed upon a shipowner had resulted in shipowner liability even where others, chiefly the stevedoring companies, were responsible for the workers' injuries. In *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956), the Court decided that the vessel could recover the damages for which it was liable to the injured longshoreman from the stevedore company if it had

breached an express or implied warranty of workmanship performance owed the vessel. Thus was erected the final leg of the triangular damage suits which had originated with *Sieracki.*

Congress undertook a comprehensive reform of the Longshore Act in 1972, including as a prime element the abolition of the *Sieracki-Ryan* unseaworthiness action for covered workers. *See Aparicio v. Swan Lake*, 643 F.2d 1109 (5th Cir.1981). In its place a complex *quid pro quo* was effectuated which included for covered workers higher compensation for injuries, and the option of bringing a negligence action against the vessel if the injury was caused "by the negligence of a vessel." 33 U.S.C. § 905(b); *see Scindia Steam Navigation*, 451 U.S. at 164-66, 101 S.Ct. at 1620-22. Strict liability actions under unseaworthiness theory and contribution or indemnity from an employer based on express or implied warranties were expressly barred. 33 U.S.C. § 905(b).

Our review of the origin and demise of longshore and harbor workers' unseaworthiness actions has led us to conclude that § 905(b) implicitly requires that a tort be consummated within the admiralty jurisdiction to be cognizable under the statute. The maritime tort action for negligence was a feature of the common law of admiralty prior to *Sieracki-Ryan*, when one group of torts involving longshore workers, those committed on board a vessel lying in navigable waters, were excepted from the negligence standard and given strict liability treatment. Section 905(b) was enacted to bar this special treatment, and essentially returned the applicable law to its pre-*Sieracki* state, when negligence had to be proven to obtain damages from a vessel.

Three circuits in addition to ourselves have determined that Congress enacted § 905(b) not to create a new cause of action for any compensation system-covered worker but to abolish the judicially-authorized unseaworthiness action

fashioned for longshore workers "injured on navigable waters while working on a ship. . . ." *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409, 74 S.Ct. 202, 205, 98 L.Ed. 143 (1953); *see* H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S. Code Cong. & Ad. News 4698, 4702 (hereinafter H.R. Rep.). The former Fifth Circuit rendered the first decision on the question of the scope of actions that can properly be brought under § 905(b). It held that the legislative history of the 1972 Amendments to the Longshore Act "leaves little doubt that Congress did not intend § 905(b) to create a new or broader cause of action in admiralty." *Parker v. South Louisiana Contractors*, 537 F.2d 113, 118 (5th Cir. 1976). The Fourth Circuit followed suit shortly thereafter in *Holland v. Sea-Land Service*, 655 F.2d 556 (4th Cir. 1981), and held that only maritime torts are cognizable under the provision, "torts cognizable under traditional federal admiralty jurisdiction. . . ." *Id.* at 558. The *Holland* court specifically determined that § 905(b) "preserves [the employee's] right under prior law to recover for third-party negligence, but it does not expressly enlarge the traditional jurisdiction of admiralty over maritime torts." *Id.* at 559. In *Christoff v. Bergeron Industries, Inc.*, 748 F.2d 297 (5th Cir. 1984), the new Fifth Circuit reaffirmed the earlier ruling in *Parker* and stated that "§ 905(b) neither extended the boundaries of traditional admiralty jurisdiction nor converted ordinary tort claims against vessels into federal questions independent of admiralty." *Id.* at 298. The Eleventh Circuit found these earlier rulings persuasive authority for its holding that § 905(b), "rather than creating a new cause of action, merely preserves certain preexisting remedies to injured workers against third parties." *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775, 778 n.9 (11th Cir. 1984).

Having concluded that only torts that are maritime are cognizable under § 905(b), the governing principles for

determining whether admiralty law will apply[3] are provided by *Executive Jet Aviation, Inc., v. Cleveland*, 409 U.S. 249, 93 S.Ct. 493, as extended by *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 102 S.Ct. 2654. Because defendants' third-party § 905(b) action is predicated solely upon BIW's alleged dereliction of duty *qua* shipowner *pro hac vice* vis-a-vis its employee Drake, and not based upon any alleged duty running from BIW to defendants, the proper question is whether plaintiff Drake could have maintained a § 905(b) action against BIW for his injuries. Accordingly, we look to whether the injury forming the basis of Drake's primary action would be cognizable in admiralty, or have admiralty law applied to it.

We consider our decision in *Austin v. Unarco* to have provided the channel markers for deciding that question. As we held there, to qualify as a maritime tort under *Executive Jet*, the wrong (1) must have occurred on navigable waters, *i.e.*, meet a situs or locality test, and (2) must have borne a significant relationship to a maritime activity, *i.e.*, meet a nexus test. *Austin v. Unarco*, 705 F.2d at 8-14. Thus, although we believe that it is necessary for the maintenance of a § 905(b) action that a party allege that a vessel's negligence was the source of the injury, such an incantation does not, as defendants contend, automatically result in the application of admiralty law.

Turning to the *Executive Jet* criteria, we first consider the situs requirement, *i.e.*, that the injury occur or take effect on navigable waters. As the Eleventh Circuit noted in *Harville*, "when an injury is the result of a number of

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[3] For a discussion of the difference between the application of admiralty law and assertion of admiralty jurisdiction, see our discussion in *Austin v. Unarco Industries, Inc.*, 705 F.2d at 6 n. 1; *see also Kermarec v. Compagnie Generale*, 358 U.S. 625, 628, 79 S.Ct. 406, 408, 3 L.Ed.2d 550 (1959); *Harville v. Johns-Manville Products Corp.*, 731 F.2d at 778-779.

exposures, only some of which occurred in a maritime situs, and where the effects of the various exposures are indivisible," the question whether the situs test is met is raised. *Harville*, 731 F.2d at 782. That court concluded, in agreement with the Second,[4] Fourth[5] and Ninth Circuits,[6] that the requirement was met "if the plaintiff has been exposed to asbestos on navigable waters regardless of whether he has also suffered exposures on land." *Id.* We see no reason to depart from the majority view on this question and we adopt it as our own. Thus, as in *Austin v. Unarco*, from our review of the record the situs requirement poses no problem to the characterization of Drake's injury as a maritime tort and "[t]he only issue, therefore, is whether the wrong bears a significant relationship to traditional maritime activity." *Austin v. Unarco*, 705 F.2d at 8-9; *see Executive Jet*, 409 U.S. at 261, 93 S.Ct. at 501.

Since our decision in *Unarco*, several other courts have considered *Executive Jet*'s second requirement of a nexus to maritime activity in relation to asbestos injuries sustained by shipyard workers. All have reasoned to the same conclusion albeit using somewhat different markers en route. *Compare, e.g., Harville v. Johns-Manville Products Corp.*, 731 F.2d 775; *Lowe v. Ingalls Shipbuilding*, 723 F.2d 1173, 1187-90 (5th Cir. 1984); *Austin v. Unarco*, 705 F.2d 1; *Keene Corp. v. United States*, 700 F.2d 836, 843-45 (2d Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 195, 78 L.Ed.2d 171 (1984); *Owens-Illi-*

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[4] *Keene Corp. v. United States*, 700 F.2d 836 (2d Cir.), *cert. denied*, —— U.S. ——, 104 S.Ct. 195, 78 L.Ed.2d 171 (1983).

[5] *White v. Johns-Manville Corp.*, 662 F.2d 234 (4th Cir. 1981), *cert. denied*, 454 U.S. 1163, 102 S.Ct. 1037, 71 L.Ed.2d 319 (1982), *vacated on other grounds sub nom. Oman v. Johns-Manville Corp.*, 764 F.2d 224 (4th Cir. 1985) (*en banc*).

[6] *Owens-Illinois v. United States District Court*, 698 F.2d 967 (9th Cir. 1983).

nois, Inc. v. United States District Court, 698 F.2d 967 (9th Cir. 1983).

In *Unarco*, we focused on the nature of the decedent's job rather than the type of project—vessel construction or repair—on which he worked. We concluded that the plaintiff was entitled to invoke admiralty only if the decedent was "injured while doing work traditionally done by members of the crew and thus, presumably, subject to many of the same hazards as seamen." 705 F.2d at 12. We ruled that because the decedent had been engaged in work "requiring special equipment and skills" not commonly found among the members of the ship's crew, admiralty law was not applicable to plaintiff's claims. *Id.* at 12-13. Other courts prior to the Eleventh Circuit's ruling in *Harville* focused on other criteria. The *Harville* Court, however, summarized and blended these various considerations, including our own, into a four-part test which harmonized with *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), *cert. denied*, 416 U.S. 969, 94 S.Ct. 1991, 40 L.Ed.2d 558 (1974), and *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed. 2d 300. The criteria to be considered under this approach are the function and roles of the parties, the type of vehicles and instrumentalities involved, the causation and type of injury, and traditional concepts of the role of admiralty law. This four-part approach to determining whether the tort possesses a sufficient nexus to traditional admiralty concerns has since been adopted by the Ninth Circuit, *see Myhran v. Johns-Manville Corp.*, 741 F.2d 1119 (9th Cir. 1984), the Fifth Circuit, *see Woessner v. Johns-Manville Sales Corp.*, 757 F.2d 634 (5th Cir. 1985), and by the Fourth Circuit *en banc* in a case overturning its lone decision holding that admiralty law applied to asbestos torts suffered by shipyard workers, *see Oman v. Johns-Manville Corp.*, 764 F.2d 224 (4th Cir. 1985) (*en banc* overruling of *White v. Johns-Manville Corp.*, 662 F.2d 234 (4th Cir. 1981)). The *Harville* ap-

proach to determining the nexus prong of the *Executive Jet* test also seems to us to be the best formulation yet set forth because it integrates a wide variety of traditional concerns of admiralty law. Accordingly, we adopt this approach.[7]

With our course thus fixed, we recognize that what appeared to be a pioneer voyage is actually just another routine trip. Among all six circuits that have considered the question, the universal conclusion is that admiralty law does not apply to these torts. We need not retrace the steps taken by the Eleventh Circuit in *Harville* nor ours in *Unarco* to show why the nexus prong of *Executive Jet* has not been satisfied here; suffice it to say that the facts here are essentially the same as in the other cases cited which found that lack of sufficient relation to traditional admiralty concerns negated the application of admiralty law.[8] We find it rather ironic, however, that in those

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[7] Judge Campbell feels that it is not necessary to fully adopt the *Harville* approach and would prefer to rest on *Unarco*.

[8] The one quarrel we have with some of our sister circuits is the emphasis they placed on long-term, latent occupational disease as not bearing sufficient maritime connection. *See, e.g., Woessner v. Johns-Manville Sales Corp.*, 757 F.2d 634, 647 (5th Cir. 1985) ("the type of injury involved here bears little if any relationship to maritime navigation or commerce"). We disagree most strongly with this view and point to, *e.g.*, one of that circuit's own cases, *Castorina v. Lykes Brothers Steamship Corp.*, 758 F.2d 1025 (5th Cir. 1985) (Wisdom, J.), where the plaintiff had for many years offloaded sacks of raw asbestos shipped in loose weave burlap bags aboard defendant's ships. Plaintiff's asbestosis was clearly caused by "traditional maritime activity." We think that the proper analytical step is to ask whether the *causation* of the injury had a sufficient connection to traditional maritime activity, not whether the *type* of injury, *e.g.*, trauma, latent occupational disease, possessed the necessary nexus. We think that the concern Congress expressed in the 1984 Amendments to the Longshore Act over the difficulties that maritime workers were experiencing in gaining compensation for latent occupational disease bolsters the case for not using the type of injury as part of the hurdle for maritime tort

other course-making cases it was the asbestos companies who were urging that admiralty law did not apply to the injuries in the primary actions, and now we find basically the same defendants attempting to refute their own prior position. The tort cannot be outside admiralty jurisdiction when sued upon in the primary action and then, by some magic, be transmuted into a maritime tort merely because it is later emphasized that some of the work where the injury occurred was performed upon a ship. That the employees worked primarily upon ships had already been taken into account in the earlier analysis. Our conclusion, then, is that the injury sustained by Drake lacked sufficient connection to the traditional concerns of admiralty, and thus, neither plaintiff nor defendants can bring a § 905(b) negligence action against BIW *qua* shipowner *pro hac vice*.

We recognize that there are cases which have either ignored or overlooked the *Executive Jet* nexus test in determining whether a tort was cognizable under § 905(b). These are *Lundy v. Litton Systems, Inc.*, 624 F.2d 590 (5th Cir. 1980), *cert. denied*, 450 U.S. 913, 101 S.Ct. 1353, 67 L.Ed.2d 337 (1981),[9] *McCarthy v. The Bark*

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actions. *See* H.R. Rep. No. 98-570, on P.L. 98-426, 98th Cong., 2d Sess., *reprinted in* U.S. Code, Cong. & Ad. News 1984, 2734, 2743 (The Committee "has amended the current law in several significant respects to insure that long-latency occupational disease claimants do not continue to encounter the severe procedural hurdles which the Longshore Act has presented in the past").

[9] In *Lundy* the plaintiff was injured on a vessel which was 97% complete but which had not completed sea trials. The district court had held that an incomplete vessel was not a "vessel" within the meaning of § 905(b) and barred the action. The Fifth Circuit disagreed in a short *per curiam* opinion, holding that the definition of "vessel" provided in the definitional section of the LHWCA, 33 U.S.C. § 902(21), encompassed torts suffered on an incomplete vessel such as occurred there. The court determined that deciding whether a § 905(b) action was properly-brought was merely a matter of turning to the definitions for "vessel" and "covered em-

Peking, 716 F.2d 130 (2d Cir. 1983),[10] and *Hall v. Hvide Hull No. 3*, 746 F.2d 294 (5th Cir. 1984). Of these, only the *Hall* opinion requires discussion, for it utilizes and extends the analysis used in the prior two cases.

In *Hall*, the defendant ships were actually hulls floating on navigable water during shipbuilding construction. The question before the court was the same as that in *Lundy*, *viz.*, whether ships under construction qualified as vessels under § 905(b). The court felt that it was bound by *Lundy's* holding that torts committed on vessels under construction were cognizable under § 905(b), despite other Fifth Circuit authority holding that maritime tort jurisdiction required satisfaction of the *Executive Jet* criteria, including a relationship to traditional maritime activity:

> The panel agrees that we are bound by *Lundy* and that, under the law of the circuit, it must be followed in the absence of en banc overruling. However, the

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ployee," and if these elements were satisfied, the action could proceed. Whether § 905(b) encompassed only maritime torts was not raised before the panel, nor did the court consider the question *sua sponte*.

[10] In *McCarthy*, a painter was injured while painting the mainmast and spars of the Bark Peking, a vessel permanently anchored and used as a museum. The Second Circuit had originally held that the plaintiff was not a covered employee for purposes of LHWCA compensation, and thus the § 905(b) action could not be brought. The Supreme Court vacated the initial decision for reconsideration in light of *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 103 S.Ct. 634, 74 L.Ed.2d 465 (1983), which is an opinion discussing the "status" requirement for LHWCA compensation. On the second trip, the Second Circuit ruled that *Perini* required that plaintiff be held a covered worker for compensation purposes. The *McCarthy* court apparently was not asked, and did not consider whether § 905(b) jurisdiction required that the Executive Jet nexus test be satisfied. It is likely that *McCarthy* has been implicitly overruled by Congress in the 1984 Amendments to the Longshore Act. *See* Pub. L. No. 98-426, 98th Cong., 2d Sess.; H.R. Rep. No. 98-570, which proscribes compensation coverage for museum employees.

> panel also notes that an issue of bancworthy dimension may be presented by the conflict between *Lundy*'s rationale and some expressions in our more recent jurisprudence that an injury to ship construction workers on board a vessel under construction, although on navigable waters, is not a maritime tort, since ship construction is not a maritime business. *See, e.g., Lowe v. Ingalls Shipbuilding, A Division of Litton*, 723 F.2d 1173, 1185, 1187 (5th Cir. 1984).

Id. at 296 (footnote omitted). The panel's signal for rehearing *en banc* went unheeded. 746 F.2d at 294 (5th Cir. 1985).

The *Hall* court attempted to square *Lundy* with *Lowe* and *Parker v. South Louisiana Contractors*, 537 F.2d 113, the Fifth Circuit's other cases, by asking the question whether § 905(b) jurisdiction extended beyond maritime tort jurisdiction as demarcated by *Executive Jet*. The court noted that torts occurring on vessels under construction qualified as maritime torts under pre-*Executive Jet* standards, citing to *Williams v. Avondale Shipyards, Inc.*, 452 F.2d 955, where a ship construction worker working on a launched but uncompleted vessel floating in navigable waters was held entitled under general maritime negligence principles to sue the vessel or its owner for injuries sustained while on the uncompleted vessel in navigable waters. *Id.* at 958-59. It then declared that the principles of *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 320 n.29, 103 S.Ct. 634, 649 n.29, 74 L.Ed.2d 465 (1983), which held that Congress lacked an intention to constrict the boundaries for LHWCA compensation from those operative pre-1972 were applicable as well to maritime tort jurisdiction under § 905(b). In particular, the *Hall* court held that the statutory language of § 905(b), which was enacted subsequent to the *Williams* opinion, was intended to preserve the extent of maritime jurisdiction over a vessel under construction for § 905(b) purposes that had been previously recognized

by *Williams*.[11] Thus, despite *Executive Jet's* addition of the nexus requirement and the holding of *Lowe* within its own circuit that ship construction is not a maritime business, the *Hall* court held that the former range of maritime torts caused by vessel negligence were intended to be grandfathered-in to the § 905(b) jurisdictional range and qualify as maritime torts. 746 F.2d at 300.

Insofar as the *Hall* panel held that only maritime torts are cognizable under § 905(b) we are in agreement. Our disagreement lies in that court's creation of a double standard for maritime tort jurisdiction. For actions brought under § 905(b) the Fifth Circuit would apparently revert to pre-1972, and pre-*Executive Jet* standards and apply only a situs test; for actions under general maritime jurisdiction, it would require satisfaction of both the situs and nexus tests.

We discern no basis for this construction of the jurisdictional range of § 905(b). *Perini* was concerned solely with *compensation*, not with maritime tort jurisdiction, and these two boundaries have for a long time been quite distinct, *see infra* at 1018-1019. We have uncovered no legislative history even intimating that Congress wished to incorporate into § 905(b) the then-current boundaries of maritime tort jurisdiction, and place them beyond the traditional common law powers of the admiralty courts. Under the Fifth Circuit's construction, § 905(b) tort jurisdiction is static and distinct from other maritime tort jurisdiction, and a double standard has been created. This is the inevitable result of the *Hall* rule even though that court itself states that "we find no . . . distinction intended by Congress between a § 905(b) action and admiralty jurisdiction," 746 F.2d at 300. We have discovered no predicate for the Fifth Circuit's unusual rule in law, logic, legislative history, or policy and we decline to

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[11] The *Hall* court did not cite any legislative history to bolster its position.

hold that jurisdiction under § 905(b) requires satisfaction merely of the definitional elements of the provision, and the situs requirement.[12]

The other theory that has been advanced, and uniformly rejected, maintains that when Congress enlarged shoreward the geographic areas where compensation would be payable under the Act as a part of the 1972 Amendments, it implicitly adopted the same geographic range for § 905(b)'s scope. *See, e.g., Parker v. South Louisiana Contractors*, 537 F.2d 113 (discussing theory that § 905(b) jurisdiction and compensation system-covered areas parallel one another). It is not clear whether appellants here subscribe to this or another theory of § 905(b)'s scope; they all but omitted argument on this point and made only the generalized claim that no independent admiralty jurisdiction had to be shown. In any event, an extended response is not necessary.

While the geographic extension shoreward of the range of areas where *compensation* would be payable under the Act was discussed in great detail in legislative hearings and committee reports, *see, e.g., Perini*, 459 U.S. at 314 n.24, 317-22, 103 S.Ct. at 646 n.24, 647-50; *see also Herb's Welding Inc. v. Gray*, —— U.S. ——, ——, 105 S.Ct. 1421, 1425, 84 L.Ed.2d 406 (1985), there is no discussion of extending the jurisdictional range of torts cognizable under § 905(b) via negligence actions beyond that allowed for other maritime torts. The one example the House Committee provided to illustrate its conception of the scope of § 905(b) negligence actions was that of a stevedore who slipped on an oil spill on a vessel's deck

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[12] It is inherently difficult to identify a congressional intention to tie § 905(b) jurisdiction to pre-*Executive Jet* boundaries since § 905(b) was enacted prior to the rendering of the *Executive Jet* (and *Foremost Insurance*) decision(s). Thus, there was no predicate for the intention the Fifth Circuit ascribes to Congress except as a hypothetical, and none was recorded in the legislative history of the statute.

while loading or unloading cargo—a classic maritime tort. *See* H.R. Rep. at 2740. Moreover, the express purpose of enacting § 905(b) was to undo the judicial decisions in *Sieracki* and *Ryan* and their unseaworthiness progeny, *id.* at 4703, which comprise a species of maritime tort.

Interpreting the scope of § 905(b) jurisdiction to include negligence actions other than maritime torts would federalize torts in an area which currently are governed by state law. We find it difficult to believe that a move this momentous, had Congress intended it, would not have received explicit discussion. Moreover, the Supreme Court's comments in *Victory Carriers* directly counsel against an extension of admiralty jurisdiction on such slender evidence as advanced here:

> We are dealing here with the intersection of state and federal law. As the law now stands, state law has traditionally governed accidents like this one. To afford respondents a maritime cause of action would thus intrude on an area that has heretofore been reserved for state law, [and] would raise difficult questions concerning the extent to which state law would be displaced or preempted. . . . In these circumstances, we should proceed with caution in constitutional and statutory provisions dealing with the jurisdiction of the federal courts.

Victory Carriers, 404 U.S. at 211, 92 S.Ct. at 424; *see also Austin v. Unarco*, 705 F.2d at 13. We agree with the Fifth Circuit's views as expressed in *Parker v. South Louisiana Contractors*, 537 F.2d 113, that there is no evidence that Congress intended to extend § 905(b) tort jurisdiction to encompass the shoreside injuries occurring on a vessel merely because those injuries would be compensable under the LHWCA.

III. LIABILITY OF BIW IN ITS CAPACITY AS EMPLOYER

We now turn to the land-based third-party negligence claims alleged in Counts I through V, which challenge acts or omissions of BIW in its capacity as an employer. There can be no question that if the MWCA is the governing law, it bars these actions. Section 4 of the Maine Act states that employers who provide workers' compensation "shall be exempt from civil actions because of such injuries either at common law or under sections 141 to 148, under Title 14, sections 8101 to 8118 or under Title 18-A, section 2-804." Me. Rev. Stat. Ann. tit. 39, § 4 (1978).[13] This provision has been unequivocally interpreted by the Maine Supreme Judicial Court to provide a covered employer with immunity from third-party claims arising from work-related injuries to its employees that "extends to all non-contractual rights of contribution and indemnity." *McKellar v. Clark Equipment Co.*, 472 A.2d at 416; *Roberts v. American Chain & Cable Co.*, 259 A.2d at 51.

Defendants do not dispute the effect of the Maine statute, but argue that it does not apply. Their argument, as we understand it, runs as follows: Plaintiffs' claim for workers' compensation was made under the Longshore Act, 33 U.S.C. §§ 901-950, not the Maine Act; therefore, it is the LHWCA that is implicated. This means that it is the exclusivity provision of the LHWCA, § 905(a),[14]

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[13] The statutes identified in § 4 relate to employers' liability in the absence of workers' compensation, actions under the Maine Tort Claims Act, and actions for wrongful death.

[14] The pertinent part of 33 U.S.C. § 905(a) provides:

> The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, ...

that controls and under *Lockheed Aircraft Corporation v. United States*, 460 U.S. 190, 103 S.Ct. 1033, 74 L.Ed.2d 911 (1983), § 905(a) does not bar third-party actions.

Since the linchpin of defendants' argument is *Lockheed*, we turn first to that decision. *Lockheed* involved the crash of a plane manufactured by Lockheed Aircraft Corporation and owned and operated by the United States Air Force. The administrator of the estate of a civilian employee of the United States Navy killed in the crash brought suit against Lockheed as the manufacturer of a defective product. Lockheed brought a third-party indemnity action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-80. The question was whether the exclusivity provision of the Federal Employees' Compensation Act (FECA), 5 U.S.C. § 8116(c), barred Lockheed's indemnification action. In holding that it was not a bar, the Court relied heavily on *Weyerhaeuser S.S. Co. v. United States*, 372 U.S. 597, 83 S.Ct. 926, 10 L.Ed.2d 1, which had "considered FECA's exclusive-liability provision and carefully reviewed its legislative history." *Lockheed*, 460 U.S. at 194, 103 S.Ct. at 1036. The Court stated:

> The Court's reasoning in *Weyerhaeuser* applies with equal force in the present case. The Government advances the same arguments before us now that it unsuccessfully advanced in *Weyerhaeuser*. To paraphrase the *Weyerhaeuser* Court's conclusion, "[t]here is no evidence whatever that Congress was concerned with the rights of unrelated third parties, much less of any purpose to disturb settled doctrines of [tort] law affecting the mutual rights and liabilities of private [parties] in [indemnity] cases." *Id.*, at 601 [83 S.Ct. at 929]. Section 8116(c) was intended to govern only the rights of employees, their relatives, and people claiming through or on behalf of them. These are the only categories of parties who

> benefit from the "*quid pro quo*" compromise that FECA adopts.

Lockheed, 460 U.S. at 196, 103 S.Ct. at 1037 (footnotes omitted).

Defendants seize upon this language to argue that *Lockheed* swept away the third-party bar of § 905(a) along with that of § 8116(c) of FECA. We disagree. We first point out that neither *Weyerhaeuser* nor *Lockheed* implicated the LHWCA. Secondly, the Court stressed twice in the course of its opinion that the underlying substantive law granting Lockheed a right to indemnification was uncontroverted, 460 U.S. at 192, 199 n.8, and the only question for decision was whether § 8116(c) of FECA interposed a bar to a third-party action against the United States. The holding in *Lockheed* is carefully and precisely worded:

> The District Court held that Lockheed had a right to indemnity under the governing substantive law, but the Court of Appeals did not rule on that question. Accordingly, we do not consider it. We adhere to the decision in *Weyerhaeuser*, and hold only that FECA's exclusive-liability provision, 5 U.S.C. § 8116(c), does not directly bar a third-party indemnity action against the United States. We reverse the judgment of the Court of Appeals and remand the case for further consideration consistent with this opinion.

460 U.S. at 199, 103 S.Ct. at 1038. *Lockheed* requires that we determine whether there is a basis in substantive law for defendants' third-party action against BIW; it does not overrule three decades of consistent Supreme Court jurisprudence regarding the interpretation of § 905(a).

A

BIW's employees are concurrently covered by the MWCA and the LHWCA. In *Sun Ship, Inc. v. Pennsyl-*

vania, 447 U.S. 715, 716, 100 S.Ct. 2432, 2434, 65 L.Ed. 2d 458 (1980), the Court, in a unanimous opinion, held that "a State may apply its workers' compensation scheme to land-based injuries that fall within the coverage of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), as amended in 1972. 33 U.S.C. §§ 901-950." After tracing the "evolution of the law of compensation for workers injured in maritime precincts," *id.* at 717, 100 S.Ct. at 2435, the Court concluded: "We therefore find no sign in the 1972 amendments to the LHWCA that Congress wished to alter the accepted understanding that federal jurisdiction would coexist with state compensation laws in that field in which the latter may constitutionally operate under the *Jensen* doctrine." *Id.* at 722, 100 S.Ct. at 2437 (footnote omitted). In *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917), the Court held that states are constitutionally barred from applying their compensation systems to maritime injuries and thus interfering with overriding federal policy of a uniform maritime law. The *Sun Ship* Court emphatically rejected the argument that for compensation "jurisdictional exclusivity is—in 'fact' or in 'law'—implied in the LHWCA." *Sun Ship*, 447 U.S. at 723, 100 S.Ct. at 2438; *see also id.* at 723-26, 100 S.Ct. at 2438-39.

The holding and reasoning of *Sun Ship* compel the conclusion that the applicable substantive law here is both the MWCA and the LHWCA. Since there can be no doubt that the Maine Act bars this third-party action, our next inquiry is as to the effect of § 905(a).

The question is whether a nonvessel tortfeasor who may be found liable for injuries to employees of a LHWCA-covered employer has a right to indemnity or contribution from the employer. Section 905(a) provides in pertinent part:

> (a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place

> of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty *on account of such injury or death*. . . . [Emphasis added.]

Our review of the case law under § 905(a) shows a nearly uniform interpretation of the statute prior to *Lockheed*. The first Supreme Court case addressing the right of contribution in light of the LHWCA is *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 72 S.Ct. 277, 96 L.Ed. 318 (1952). The facts are simple: an employee of Haenn was injured on one of Halcyon's ships while making repairs; the employee sued Halcyon on the grounds of negligence and unseaworthiness; the jury found Haenn 75% and Halcyon 25% liable. The Court declined to apply the admiralty collision doctrine "that the mutual wrongdoers shall share equally the damages sustained by each, as well as personal injury and property damages inflicted on innocent third-parties," *id.* at 284, 72 S.Ct. at 279, and stated categorically that a right of contribution did not exist in maritime, noncollision cases. Noting the extensive legislation in this field, *i.e.*, the Harbor Workers Act, the Jones Act, the Public Vessels Act, the Limited Liability Act, and the Harter Act, the Court held: "In view of the foregoing, and because Congress while acting in the field has stopped short of approving the rule of contribution here urged, we think it would be inappropriate for us to do so." *Id.* at 287, 72 S.Ct. at 280. Although the Court did not reach the issue of the impact of § 905(a), later decisions have explained that *Halcyon* stands for the principle that contribution actions against the compensation-paying employer are barred by § 905(a).

Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed.2d 694 (1974), was one of these explanatory decisions. The Supreme Court clarified

that "despite the occasional breadth of its dictum, . . . *Halcyon* stands for a more limited rule than [an] absolute bar against contribution in noncollision cases . . . ." *Id.* at 111, 94 S.Ct. at 2177. The Court recognized instead "the well-established maritime rule allowing contribution between joint tortfeasors." *Id.* at 113, 94 S.Ct. at 2178. But this rule was limited by the exclusivity provision of the LHWCA when contribution was sought from the compensation-paying employer of the injured worker. The *Cooper* Court pointed out that this result was reached in *Atlantic Coast Line R. Co. v. Erie Lackawanna R. Co.*, 406 U.S. 340, 92 S.Ct. 1550, 32 L.Ed.2d 110 (1972), where "Erie, against whom contribution was sought, was the plaintiff's employer. . . ." *Cooper*, 417 U.S. at 114, 94 S.Ct. at 2179. The Court stated that it had ruled Erie to be "entitled to the limitation of liability protections of the Harbor Workers' Act, just like the employer in *Halcyon*." *Id.* And again, it stated, "Erie was accordingly entitled to the protective mantle of the Act's limitation-of-liability provisions." *Id.* at 115, 94 S.Ct. at 2179. The Court concluded by saying that "*Atlantic* proves only that our decision in *Halcyon* was, and still is, good law on its facts." *Id.* This interpretation of *Halcyon* and *Atlantic* was later reaffirmed in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979), where the Court stated: "We . . . held that the shipowner could not circumvent the exclusive-remedy provision by obtaining contribution from the concurrent tortfeasor employer. *Halcyon Lines* . . . ." *Id.* at 261, 99 S.Ct. at 2757.

We note that our construction of § 905(a) is in accord with the most recent authoritative expressions of Congress. Senator Nickles, the chair of the Senate Labor Subcommittee and one of the managers of the 1984 Amendments to the Longshore Act, explained the conference committee's concerns to the Senate:

> The conferees were also concerned over the effect of the Supreme Court's decision in *Lockheed Aircraft Corp. v. United States et al*, [460] U.S. [190, 103 S.Ct. 1033, 74 L.Ed.2d 911], which decided that the Federal Employees' Compensation Act did not bar third party claims for indemnification. Because section 5(a) of the Longshore Act contains nearly identical language to FECA, we considered an amendment to section 5(a). However, the plain meaning of the existing language indicates that there should be no third party liability. In addition, the clear congressional intent of the 1972 amendments to the act was to eliminate the problem of "circular suits" whereby employers paid workers compensation and then through suits by third parties became liable for additional amounts.

130 Cong. Rec. 11621 (daily ed. Sept. 20, 1984).

The Courts of Appeals, so far as we can determine, also have interpreted § 905(a) to bar contribution, and some forms of indemnity, from an LHWCA employer. *See, e.g., Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714-19 (2d Cir. 1978) (Friendly, J.); *Watz v. Zapata Off-Shore Co.*, 431 F.2d 100, 120 (5th Cir. 1970); *Horton & Horton, Inc., v. T/S J.E. Dyer*, 428 F.2d 1131, 1133-34 (5th Cir. 1970); *see also American Mutual Liability Insurance Co. v. Matthews*, 182 F.2d 322 (2d Cir. 1950); *St. Julien v. Diamond M. Drilling*, 403 F.Supp. 1256, 1259 (E.D. La. 1975). In these and other cases, frequently a distinction has been drawn between contractual (express or implied) indemnity, and noncontractual indemnity. Where indemnity is sought on the basis of an express or implied contract, the indemnity action has been held to proceed not "on account of injury," § 905(a), to the employee but because of the contract. *See, e.g., Pippen v. Shell Oil Co.*, 661 F.2d 378, 386-88 (5th Cir. 1981); *Zapico v. Bucyrus-Erie Co.*, 579 F.2d at 718, 721-22.

Here, defendants sue only for contribution and noncontractual indemnity. Based on the principles of *Halcyon* and *Atlantic*, as interpreted by *Cooper Stevedoring* and *Edmonds*, we rule that the contribution claims against BIW in its capacity as employer are barred by the exclusive-remedy provision of the LHWCA, 33 U.S.C. § 905(a). As far as the noncontractual indemnity claims are concerned, the facts presented here compel us to characterize them as tort based contribution claims, *see supra* note 2. Accordingly, these claims are also barred by § 905(a).

Because the exclusivity provisions of both the Maine Act, § 4, and the federal LHWCA, § 905(a), bar these third-party claims against BIW *qua* employer, we have no need to reach the question whether the LHWCA preempts an inconsistent state exclusivity provision.

We have carefully considered defendants' other claims for relief and find them without merit. As far as the *pro tanto* claim is concerned, we note that the Maine Supreme Judicial Court has very recently rejected defendants' position. *See Diamond International Corp. v. Sullivan & Merritt, Inc.*, 493 A.2d 1043 (Me. 1985).

The judgment of the district court dismissing the third-party complaint is affirmed.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 84-1779

IN RE: ALL MAINE ASBESTOS LITIGATION (PNS CASES)

UNITED STATES OF AMERICA,
Petitioner.

Before
Campbell, *Chief Judge*,
Coffin, Bownes, Breyer * and Torruella,
Circuit Judges.

ORDER OF COURT

Entered: October 30, 1985

The petition for rehearing and rehearing en banc is denied.

Petitioner asserts that an analysis under *Harville* v. *Johns-Manville Products Corp.*, 731 F.2d 775 (11th Cir. 1984), would indicate that its third-party claim bears a sufficient relationship to traditional maritime activity. It seeks to distinguish the cases we cite on the ground that they have not involved a suit by a shipyard worker against a *shipowner* for failure to warn of dangers of asbestos on ships brought to a yard for repair.

We pass over the question whether the absence of an actual suit against BIW by plaintiff would itself defeat

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* Circuit Judge Stephen Breyer did not participate.

petitioner's third party claims. We proceed to what we deem the controlling *Harville* factor in our cases, whether the need for uniformity in maritime commerce mandates application of admiralty law. Although petitioners make a reasonable argument that a shipowner's duty to warn workers of dangers hidden on board should be governed by a uniform maritime law, we think the better approach is to see this as a situation appropriately left to state tort law. If Drake has sued BIW as *pro hac vice* vessel owner for failure to warn or protect against a dangerous condition, the questions would have been whether working with asbestos was dangerous and whether BIW knew or should have known of it. These are the same questions that would arise if Drake had worked with asbestos, without warning or protection, on a ship not owned by BIW, or in one of BIW's warehouses on land. As the court in *Harville* noted, the issues that such litigation would have presented "are identical to those presented in countless other asbestos suits; they involve questions of tort law traditionally committed to local resolution." *Harville*, 731 F.2d at 786.

Petitioner notes on page 14 of the petition that the "Court on its own motion reviewed documents in the district court" and seems to suggest that this was beyond our scope of review. The only material that was forwarded to the clerk of the court of appeals for review was the appendix. Because of the importance of the case, the court felt that it would be wise to examine the entire record. In order to do this, the record had to be obtained directly from the clerk of the district court in Portland, Maine. It is the custom of this court, in cases that require it, to examine the record in detail and not to rely entirely on the appendix.

By the Court,

/s/ Francis P. Scigliano
Clerk

[cc: Messrs. Cox, Silberfeld, Furey and Fogarty]

APPENDIX F

33 U.S.C. § 905(b) (1982)

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

APPENDIX G

33 U.S.C. § 902(3) (1982)

§ 902. Definitions

When used in this chapter—

* * * *

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

33 U.S.C. § 903(a) (1982)

§ 903. Coverage

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee or the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

IN RE: ALL MAINE ASBESTOS LITIGATION
ARISING OUT OF PORTSMOUTH NAVAL SHIPYARD

MODEL THIRD-PARTY COMPLAINT AGAINST THE UNITED STATES OF AMERICA: "B"

AND NOW COMES The Defendants-Third-Party Plaintiffs and bring this Third-Party Complaint against the UNITED STATES OF AMERICA ("USA") for indemnification and/or contribution alleging it is liable to the Third-Party Plaintiffs for all or part of such amounts, if and as may be recovered by the Plaintiffs in these actions against the Defendants-Third-Party Plaintiffs, and in support thereof set forth upon information and belief the following:

JURISDICTION

1. This third-party action is brought and maintained pursuant to the provisions of the Federal Tort Claims Act, 28 U.S.C. § 1346(b) and 28 U.S.C. § 2671 *et seq.*, and the Tucker Act, 28 U.S.C. § 1346(a)(2). If it is ultimately determined that admiralty jurisdiction is applicable to this litigation, then this Court also has jurisdiction over the third-party claims under the general admiralty and maritime jurisdiction of the federal courts, 28 U.S.C. § 1333, the Suits in Admiralty Act, 46 U.S.C. §§ 741 *et seq.*, the Public Vessels Act, 46 U.S.C. §§ 782 *et seq.*, and the Admiralty Extension Act, 46 U.S.C. § 740.

THE PARTIES

2. Plaintiffs allege that they were employed as insulation workers and in other capacities at the Portsmouth

Naval Shipyard. Plaintiffs further allege that during the course of their employment they were exposed to insulation products containing asbestos manufactured and/or sold by the defendants-third-party plaintiffs. As a result of such exposure, plaintiffs allege that they have sustained personal injuries and damages.

3. The defendants-third-party plaintiffs are corporations organized under the laws of various states. The defendants-third-party plaintiffs have answered plaintiffs' complaints, have denied any and all liability to plaintiffs and make the allegations of this third-party complaint if, and only if, they are found liable for some or all of plaintiffs' alleged damages.

4. Third-party defendant United States of America ("USA") is a sovereign state which has consented to be sued herein. At all times relevant hereto the following were agencies of the USA and employees of the following were employees of the USA within the meaning of those terms as used in the Federal Tort Claims Act:

(a) The United States Department of Defense;

(b) The United State Department of the Navy;

(c) The United States Department of Health, Education and Welfare;

(d) The United States Department of Labor;

(e) The United States Department of Commerce; and

(f) The General Services Administration and other departments, agencies and subdivisions of the United States of America, including but not limited to the United States Public Health Service, its division of Occupational Safety and Health Administration and the National Institute of Occupational Safety and Health.

FIRST CLAIM FOR RELIEF

5. The defendants-third-party plaintiffs repeat and reiterate each and every allegation contained in paragraphs

1 through 4 herein with the same force and effect as if fully set forth in this paragraph.

6. On a number of occasions, the USA sold raw asbestos to certain of the defendants-third-party plaintiffs. Said raw asbestos was incorporated into insulation products by those defendants-third-party plaintiffs and sold in compliance with government specifications to Portsmouth Naval Shipyard.

7. At all times that the USA sold asbestos as described above, the USA knew or should have known of the potential dangers, hazards and risks of harm from exposure to asbestos. Moreover, the USA knew or should have known of the potential for harm to insulation workers such as plaintiffs who, in the course of their employment, would forseeably be exposed to asbestos sold by the USA.

8. Accordingly, the USA, as the seller of asbestos, owed a duty to the defendants-third-party plaintiffs, other parties which purchased asbestos from the USA and plaintiffs to provide information and warnings regarding the potential dangers, hazards and risks of exposure to asbestos.

9. The USA breached its duty by failing to provide any warnings or information regarding the potential dangers, hazards and risks of exposure to asbestos.

10. If plaintiffs sustained the injuries and damages alleged in their complaints, those damages were caused in whole or in part by the USA's breach of its duty as described above. Accordingly, if the defendants-third-party plaintiffs are found liable for plaintiffs' damages, then the defendants-third-party plaintiffs are entitled to indemnification and/or contribution from the USA, plus costs, disbursements and attorneys' fees.

SECOND CLAIM FOR RELIEF

11. The defendants-third-party plaintiffs repeat and reiterate each and every allegation contained in para-

graphs 1 through 10 herein with the same force and effect as if fully set forth in this paragraph.

12. Plaintiffs have alleged that the asbestos sold by the defendants-third-party plaintiffs to Portsmouth Naval Shipyard was defective and unreasonably dangerous. If this is true, and the defendants-third-party plaintiffs deny that it is true, then the raw asbestos sold by the USA to certain of the defendants-third-party plaintiffs was similarly defective and unreasonably dangerous.

13. If plaintiffs sustained the injuries and damages alleged in their complaints, those damages were caused by the USA's sale of a defective and unreasonably dangerous product as described above. Accordingly, if the defendants-third-party plaintiffs are found liable for plaintiffs' damages, then the defendants-third-party plaintiffs are entitled to indemnification and/or contribution from the USA, under the theory of strict products liability, plus costs, disbursements and attorneys' fees.

THIRD CLAIM FOR RELIEF

14. The defendants-third-party plaintiffs repeat and reiterate each and every allegation contained in paragraphs 1 through 13 herein with the same force and effect as if fully set forth in this paragraph.

15. In selling asbestos to certain of the defendants-third-party plaintiffs, the USA impliedly warranted that such asbestos was safe and reasonably fit for its intended purpose of inclusion in thermal-insulation materials to be used for purposes such as the construction and repair of United States naval vessels. If it is established that such asbestos was not safe and fit for its intended purpose as described above, then the USA breached its implied warranty of fitness to the defendants-third-party plaintiffs.

16. If plaintiffs sustained the injuries and damages alleged in their complaints, those damages were caused in whole or in part by the USA's breach of warranty as de-

scribed above. Accordingly, if the defendants-third-party plaintiffs are found liable for plaintiffs' damages, then each defendant-third-party plaintiff is entitled to indemnification from the USA in an amount not exceeding $10,000.00 per plaintiff, plus costs, disbursements and attorneys' fees.

FOURTH CLAIM FOR RELIEF

17. The defendants-third-party plaintiffs repeat and reiterate each and every allegation contained in paragraphs 1 through 16 herein with the same force and effect as if fully set forth in this paragraph.

18. All contracts for the sale by the defendants-third-party plaintiffs of insulation products to the Portsmouth Naval Shipyard for use in the construction and repair of United States naval vessels contained specifications which required the use of asbestos containing thermal insulation products.

19. Upon information and belief, these specifications were promulgated exclusively by the USA.

20. All insulation products sold by the defendants-third-party plaintiffs to the Portsmouth Naval Shipyard conformed in every respect to the USA's specifications.

21. In addition to the foregoing, the USA exercised supervision and control over the work performed at the Portsmouth Naval Shipyard and it was the duty and responsibility of the USA to provide for the safety and welfare of those persons, including plaintiffs, engaged in the construction and repair of United States naval vessels at the Portsmouth Naval Shipyard. In this connection, the USA had promulgated safety regulations, standards and procedures directed at protecting workers from the potential dangers, hazards and risks of exposure to asbestos. Among other things, the regulations, standards and procedures required the use of protective clothing, and required the workers to adhere to certain procedures

aimed at minimizing their exposure to asbestos while at work.

22. Moroever, agents and employees of the USA were present at the work sites on a regular basis. It was their responsibility to enforce the USA's safety regulations and procedures, to otherwise provide for the safety of the asbestos workers, and to exercise general supervision, control and direction over the work performed on board United States naval vessels at the Portsmouth Naval Shipyard.

23. In contrast, the defendants-third-party plaintiffs were never present at these work sites, had no responsibility for the safety of the workers, and had no control over the use of their products, the manner in which the work was performed, and the enforcement of the USA's safety procedures.

24. In light of the foregoing, the USA impliedly warranted to the defendants-third-party plaintiffs that it would use due care in designing, specifying and overseeing the use of asbestos products at the Portsmouth Naval Shipyard.

25. The USA breached this implied warranty by, among other things, failing to promulgate specifications for insulation products which were safe and which could be used in a safe manner; failing to exercise reasonable care; failing to provide for the safety of the workers who were engaged in construction or repair of United States naval vessels at the Portsmouth Naval Shipyard; failing to provide plaintiffs and other workers with warnings or information regarding the potential dangers, hazards and risks of exposure to asbestos; failing to promulgate and enforce adequate safety regulations, standards or procedures; and failing to see to it that the insulation products manufactured and/or sold by the defendants-third-party plaintiffs were not misused or used in a fashion which would endanger the health and safety of the workers.

26. If plaintiffs sustained the injuries and damages alleged in their complaints, those damages were caused by the USA's breach of its implied warranty as described above. Accordingly, if the defendants-third-party plaintiffs are found liable for plaintiffs' damages, then each defendant-third-party plaintiff is entitled to implied contractual indemnification from the USA in an amount not exceeding $10,000.00 per plaintiff, plus costs, disbursements and attorneys' fees.

FIFTH CLAIM FOR RELIEF

27. The defendants-third-party plaintiffs repeat and reiterate each and every allegation contained in paragraphs 1 through 26 herein with the same force and effect as if fully set forth in this paragraph.

28. The USA sold raw asbestos to certain of the defendants-third-party plaintiffs, which in turn sold insulation products containing asbestos to the Portsmouth Naval Shipyard for use in the construction and repair of United States naval vessels.

29. The defendants-third-party plaintiffs sold insulation products to Portsmouth Naval Shipyard pursuant to contracts which contained specifications requiring the use of asbestos-containing thermal insulation products in the construction and repair of United States naval vessels.

30. Upon information and belief, those specifications were promulgated exclusively by the USA.

31. All insulation products sold by the defendants-third-party plaintiffs to the Portsmouth Naval Shipyard conformed in every respect to the USA's specifications.

32. The USA exercised supervision and control over the work performed by plaintiffs at the Portsmouth Naval Shipyard and it was the duty and the responsibility of the USA to provide for the safety and welfare of those persons, including plaintiffs, engaged in the construction

and repair of United States naval vessels at the Portsmouth Naval Shipyard.

33. In contrast, the defendants-third-party plaintiffs were never present at the Portsmouth Naval Shipyard, had no responsibility for the safety of the workers, and had no control over the use of their products, the manner in which the work was performed, and the enforcement of the USA's safety procedures. In addition, the defendants-third-party plaintiffs had no reason to believe that the USA would utilize the thermal insulation products provided by them in a manner which would endanger the health of the workers at the Portsmouth Naval Shipyard.

34. In light of all of the foregoing, the USA owed the defendants-third-party plaintiffs a duty to exercise reasonable care in connection with the construction and repair of naval vessels at the Portsmouth Naval Shipyard. Among other things, the USA was obligated to exercise reasonable care to provide for the safety of the workers at Portsmouth Naval Shipyard who were engaged in the construction and repair of the USA's naval vessels; to provide the workers at Portsmouth Naval Shipyard with warnings and information regarding the potential dangers of exposure to asbestos; to promulgate specifications for thermal insulation products which were safe and which could be used in a safe manner; and to assure that the thermal insulation products provided by the defendants-third-party plaintiffs to the Portsmouth Naval Shipyard were not misused or used in a fashion which would endanger the health and safety of the workers at that shipyard.

35. The USA breached its duty to the defendants-third-party plaintiffs by negligently failing to exercise reasonable care; negligently failing to provide for the safety of the workers at Portsmouth Naval Shipyard who were engaged in the construction and repair of the USA's naval vessels; negligently failing to provide the workers

at Portsmouth Naval Shipyard with warnings and information regarding the potential dangers of exposure to asbestos; negligently failing to promulgate specifications for thermal insulation products which were safe and which could be used in a safe manner; and negligently failing to assure that the thermal insulation products provided by the defendants-third-party plaintiffs to the the Portsmouth Naval Shipyard were not misused or used in a fashion which would endanger the health and safety of the workers at that shipyard.

36. If plaintiffs sustained the injuries and damages alleged in their complaints, those damages were caused by the failure of the USA to exercise reasonable care as described above. Accordingly, if the defendants-third-party plaintiffs are found liable for plaintiffs' damages, then defendants-third-party plaintiffs are entitled to indemnification from the USA, plus costs, disbursements and attorneys' fees.

SIXTH CLAIM FOR RELIEF

37. The defendants-third-party plaintiffs repeat and reiterate each and every allegation contained in paragraps 1 through 36 herein with the same force and effect as if fully set forth in this paragraph.

38. Upon information and belief, the USA owned and operated the Portsmouth Naval Shipyard and owned the United States naval vessels on which plaintiffs performed work allegedly involving exposure to asbestos. In addition, the above work was done under the supervision, direction and control of the USA.

39. Accordingly, as the owner of the shipyard and the vessels, as the designer of the specifications which required the use of insulation products containing asbestos in the construction and repair of its vessels, and as the general supervisor of the work performed at the shipyard and on board its vessels, the USA owed and/or assumed

a duty to plaintiffs to provide warnings regarding the potential dangers of exposure to asbestos, to provide plaintiffs with a safe place to work, and to exercise reasonable care to provide for plaintiffs' health, safety, and well-being. In addition, the USA owed plaintiffs a duty to provide warnings about the potential dangers of asbestos exposure subsequent to the time that plaintiffs terminated their employment with the government at Portsmouth Naval Shipyard or otherwise.

40. The USA breached its duty to plaintiffs by negligently and recklessly failing to provide plaintiffs with warnings regarding the potential dangers of exposure to asbestos, by failing to provide plaintiffs with a safe place to work, and by failing to exercise reasonable care to provide for plaintiffs' health, safety and well-being.

41. Specifically, and without limitation, the USA breached its duty to plaintiffs by negligently failing to provide warnings regarding the latent and hidden peril posed by the asbestos insulation material which was used in the construction and repair of United States naval vessels; and by negligently failing to provide warnings and take other measures to protect plaintiffs from the inherently dangerous nature of work involving exposure to asbestos and asbestos products.

42. Moreover, the USA negligently failed to provide plaintiffs with warnings about the potential dangers of asbestos exposure subsequent to the time that plaintiffs terminated their employment with the government.

43. If plaintiffs sustained the injuries and damages alleged in their complaints, those damages were caused by the misconduct of the USA as described above, in breach of the duty or duties owed and/or assumed by the USA to plaintiffs. Accordingly, if the defendants-third-party plaintiffs are found liable for plaintiffs' damages, then the defendants-third-party plaintiffs are entitled to

indemnification and/or contribution from the USA, plus costs, disbursements and attorneys' fees.

SEVENTH CLAIM FOR RELIEF

44. The defendants-third-party plaintiffs repeat and reiterate each and every allegation contained in paragraphs 1 through 43 herein with the same force and effect as if fully set forth in this paragraph.

45. By virtue of having undertaken to act and pursue a course of conduct, pursuant to statute, regulation or otherwise, involving the study of the potential dangers, hazards and risks of exposure to asbestos, and further involving efforts to protect the health, safety and welfare of asbestos workers, the USA owed and/or assumed a duty of care to the defendants-third-party plaintiffs and to all asbestos workers, including plaintiffs, who relied on the USA's actions to their detriment. Specifically, and without limitation, the USA owed and/or assumed a duty to the defendants-third-party plaintiffs and to all asbestos workers including plaintiffs to provide warnings and information regarding the potential dangers, hazards and risks of exposure to asbestos; to establish and enforce regulations, standards and procedures to protect the health, safety and welfare of asbestos workers; to provide medical care and attention to persons exposed to asbestos; and to otherwise protect the health, safety and welfare of asbestos workers.

46. The USA breached its duty, without limitation, by failing to provide warnings and information regarding the potential dangers, hazards and risks of exposure to asbestos; by failing to establish and enforce adequate regulations, standards and procedure to protect the health, safety and welfare of asbestos workers and by failing to follow its own mandatory procedures regarding the foregoing; by failing to provide medical care and attention to persons exposed to asbestos; and by failing to

otherwise provide for the health, safety and welfare of asbestos workers.

47. If plaintiffs sustained the injuries and damages alleged in their complaints, those damages were caused in whole or in part by the USA's breach of duty as described above. Accordingly, if the defendants-third-party plaintiffs are found liable for plaintiffs' damages, the defendants-third-party plaintiffs are entitled to indemnification and/or contribution from the USA, plus costs, disbursements and attorneys' fees.

EIGHTH CLAIM FOR RELIEF

48. The defendants-third-party plaintiffs repeat and reiterate each and every allegation contained in paragraphs 1 through 47 herein with the same force and effect as if fully set forth in this paragraph.

49. At all times herein, the USA knew of potential dangers, hazards and risks of harm from the use of and exposure to cigarettes, tobacco smoke and other tobacco products. In particular, the USA knew or should have known of the potential for harm to workers such as plaintiffs who, in the course of their employment and otherwise, were exposed to cigarettes, tobacco smoke and other tobacco products. The USA knew or should have known of the potential for increased and greater harm to workers such as plaintiffs who, in the course of their employment and otherwise, were exposed to cigarettes, tobacco smoke and other tobacco products while also being exposed to products containing asbestos.

50. Accordingly, the USA owed and/or assumed a duty to plaintiffs during their employment at Portsmouth Naval Shipyard to provide information and warnings regarding the potential dangers, hazards and risks of exposure to cigarettes, tobacco smoke and other tobacco products in general and in conjunction with exposure to products containing asbestos. Moreover, the USA owed

plaintiffs the duty to provide the above warnings subsequent to the time that plaintiffs terminated their employment with the government at Portsmouth Naval Shipyard or otherwise.

51. The USA breached its duty to plaintiffs by failing to provide any warnings or information regarding the potential dangers, hazards and risks of exposure to cigarettes, tobacco smoke and other tobacco products in general and in conjunction with exposure to products containing asbestos. In addition, the USA negligently failed to provide plaintiffs with such warnings subsequent to the time that plaintiffs terminated their employment with the government.

52. If plaintiffs sustained the injuries and damages alleged in their complaints, those damages were caused in whole or in part by the USA's breach of its duty as described above. Accordingly, if the defendants-third-party plaintiffs are found liable for plaintiffs' damages, then the defendants-third-party plaintiffs are entitled to indemnification and/or contribution from the USA, plus costs, disbursements and attorneys' fees.

NINTH CLAIM FOR RELIEF

53. The defendants-third-party plaintiffs repeat and reiterate each and every allegation contained in paragraphs 1 through 52 herein with the same force and effect as if fully set forth in this paragraph.

54. If it should be ultimately determined that admiralty jurisdiction is applicable to this litigation, then the defendants-third-party plaintiffs maintain that the injuries allegedly sustained by plaintiffs, if any, were caused by the wrongs of the USA which occurred on navigable waters, and were caused by a vessel or vessels on navigable waters. Accordingly, if the defendants-third-party plaintiffs are found liable for plaintiffs' damages, then the defendants-third-party plaintiffs are entitled to in-

demnification and/or contribution from the USA, in accordance with the principles of admiralty and maritime law, plus costs, disbursements and attorneys' fees.

WHEREFORE, the defendants-third-party plaintiffs respectfully demand judgment against the USA on the First, Second and Fifth through Ninth Claims of this third-party complaint for indemnification and/or contribution, plus costs, disbursements and attorneys' fees, and each defendant-third-party plaintiff further demands judgment against the USA on the Third and Fourth Claims herein for indemnification in an amount not exceeding $10,000.00 per plaintiff, plus costs, disbursements and attorneys' fees, together with such other and further relief as to the Court seems just and proper.

APPENDIX I

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

IN RE ALL MAINE ASBESTOS LITIGATION

AMENDED ORDER OF THE COURT

(*See* Fed. R. App. P. 5(a))

In accordance with the opinion of this Court in the above-captioned cases dated February 23, 1984, *see In re All Maine Asbestos Litigation*, 581 F. Supp. 963 (D. Me. 1984), as supplemented by the opinion of this Court dated July 6, 1984, *see In re All Maine Asbestos Litigation (PNS Cases)* (D. Me. July 6, 1984), it is ORDERED as follows:

(1) That the motion of the United States to dismiss, or for summary judgment on, Counts I, II, III, IV, V, VII, VIII and IX of Model Third-Party Complaint A is GRANTED;

(2) That the motion of the United States to dismiss, or for summary judgment on, Count VI of Model Third-Party Complaint A is DENIED;

(3) That the motion of the United States to dismiss, or for summary judgment on, Counts I, II, III, IV, V, VII, VIII and IX of Model Third-Party Complaint B is GRANTED;

(4) That the motion of the United States to dismiss, or for summary judgment on, Count VI of Model Third-Party Complaint B is DENIED.

In accordance with 28 U.S.C. § 1292(b), the Court hereby CERTIFIES that it is of the opinion that the

above order involves controlling questions of law as to which there are substantial grounds for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

Dated at Portland, Maine, this 23d day of July 1984.

/s/ Edward T. Gignoux
United States District Judge

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Misc. No. 84-8045

IN RE: ALL MAINE ASBESTOS LITIGATION (PNS CASES),

v.

UNITED STATES OF AMERICA,
Petitioner.

Before

CAMPBELL, *Chief Judge,*
COFFIN AND BOWNES, *Circuit Judges*

ORDER OF COURT

Entered September 20, 1984

The United States' petition for permission to appeal the district court's denial of its request for dismissal of count VI of third party complaint "B" is granted. The parties are directed to address in their briefs the additional question of whether a trial would be necessary prior to certification of the state law question to the Maine Supreme Judicial Court should we decide that certification is appropriate.

Pittsburg Corning Corporation's petition for permission to appeal the dismissal of counts I, II, III, IV, V,

VII, VIII, and IX of model third party complaint "B" is denied.

By the Court,
/s/ Francis P. Scigliano
Clerk

[Cert. cc: Clerk, USDC of Maine, cc: Messrs. Silberfeld, Lib, Moore, Thorton, Murray, Thaler, Hanson, Goggin, Mulvey, Schulten, Remmel, Simmons, Smith, Higbee, Bowie, Beagle, Nyhan, Nadzo, Monaghan, Leagy, Hochadel, Libby, Wright, McNaboe, Buckley, Henderson, Thornhill, Emery, Burns, Linnell, Silsby, Rubin, Winger, Culley, and Friedman]

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISRICT OF CALIFORNIA

No. C 81-4561 RFP

JOHNS-MANVILLE SALES CORP.,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

ORDER RE MOTION TO DISMISS

INTRODUCTION:

Johns-Manville Sales Corp. ("J-M") filed this action against the United States on December 7, 1981, to recover equitable indemnity, in whole or in part, from the United States, in the amount Johns-Manville paid to settle a claim with John C. Robinson.[1] Robinson was a federal

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[1] In February of 1983, the court dismissed the first three causes of action of J-M's 1981 complaint, on the grounds that the court had not subject matter jurisdiction because J-M had failed to file for administrative relief under the Federal Tort Claims Act, 28 U.S.C. § 2675. The court retained jurisdiction over J-M's fifth amendment claim because it involved no administrative claim requirement. On January 9, 1984, the court granted J-M's request to file its first amended complaint because the court found that J-M had satisfied its duty to bring an administrative claim.

At that time, the court also rejected the government's argument that the exclusive remedy provision of the Federal Employees' Compensation Act ("FECA"), 5 U.S.C. § 8116(c), barred J-M's first four claims. The court found that the 1983 Supreme Court decision in *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983), effectively answered the defendant's argument.

employee allegedly injured by exposure to asbestos-containing products J-M manufactured while working at Long Beach and Mare Island Naval Shipyards in California. Robinson was employed in these shipyards from 1965 to 1980. J-M settled that case for $45,000 in October of 1981.

J-M asserts four claims in its first amended complaint.[2] These claims fall into two categories: 1) claims that the United States breached a duty it owed directly to Johns-Manville, and 2) a claim for partial equitable indemnity[3] because the government, as employer and vessel owner, was negligent towards John Robinson.

The government has moved to dismiss claims one through four on the grounds that these counts fail to state a claim upon which relief can be granted, and that this court does not have subject matter jurisdiction. For the reasons set forth below, the court denies the defendant's motion to dismiss claims one, two, and three, because J-M alleges that it was forced, under threat of civil and criminal penalties, to supply asbestos to the government. As discussed below, however, it is not clearly stated how asbestos J-M supplied during World War II caused Robinson harm. With regard to the causal ele-

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[2] In its first amended complaint, J-M originally included a count alleging a fifth amendment taking violation and a count asserting admiralty jurisdiction. In its reponse to the defendant's motion to dismiss, J-M has dropped its claims based on these two theories.

[3] Claim four of the first amended complaint originally also contained a claim for contribution. Contribution in California is a statutory right, and may only be had when a "money judgment has been rendered jointly against two or more defendants in a tort action." Cal. Code Civ. Pro. § 875. The government says that no money judgment has been rendered against J-M and the United States in Robinson's action, and therefore J-M is not entitled to contribution.

J-M has conceded the accuracy of the government's interpretation of California contribution law and drops its claim for contribution. Plaintiff's Opposition, filed 7/30/84 at 46.

ment, the court treats the defendant's motion to dismiss as a motion for more definite statement and grants J-M thirty days to amend its complaint to state facts to show the causal link between defendant's behavior and Robinson's injury for counts one, two, and three.

The court also denies the defendant's motion to dismiss the fourth claim, preserving it to the extent that it rests on a theory of the defendant's liability to John Robinson as vessel owner.

LEGAL ANALYSIS:

The legal analysis in this case is complex and depends upon a careful understanding of the relationship between the doctrines of waiver of sovereign immunity and state laws providing for liability and indemnification. The court first sets forth an overview of its analysis of the welter of laws and legal principles discussed by the parties in voluminous briefs.

Johns-Manville is suing the government under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), and 2671, *et seq.* Section 1346(b) of Title 28 provides jurisdiction for federal courts over suits against the United States where the "United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Under the FTCA, the liability of the government depends on whether a private person [4] in like circumstances

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[4] Note that this analysis makes state law regarding the liability of municipalities irrelevant to this case. The Supreme Court has said that federal law governs the scope of the federal government's immunity, therefore any state law on municipal and state government immunity does not apply to suits under the FTCA. *United States v. Muniz*, 374 U.S. 150 (1963) (FTCA allowed suit by federal prisoner who alleged negligence by federal prision officials in Indiana, even though state law may bar such suits by state prisoners).

In other words, the court must apply the state law applicable as if the federal government were a private person acting in that state.

would be liable under the state law applicable where the act or omission occurred. *United States v. Muniz*, 372 U.S. 150, 153 (1963); *Poindexter v. United States*, 752 F.2d 1317 (9th Cir. 1983); *Wright v. United States*, 719 F.2d 1932, 1934 (9th Cir. 1983) ("The elements of a cause of action under the FTCA are determined by state law."); *Rudelson v. United States*, 602 F.2d 1326, 1332-33 (9th Cir. 1979). Thus, the court must ask whether, under the applicable state law, the plaintiff has stated facts which, if the government was a private person, would support liability.[5]

See e.g., Indian Towing Co. v. United States, 350 U.S. 61, 65 (1955) (United States could be liable for negligent operation of lighthouse. Court rejected the reading of "the statute [FTCA] as imposing liability in the same manner as if it [the government] were a municipal corporation and not as if it were a private person."); *Wright v. United States*, 719 F.2d 1032, 1043 (9th Cir. 1983) (plaintiff could sue IRS agent for malicious prosecution under the FTCA even though California law provided California government agents immunity from malicious prosecution action; court said equating the United States to that of a state municipal corporation under state law would be erroneous); *Guy v. United States*, 492 F. Supp. 571, 571-72 (N.D. Cal. 1980) (federal prisoner allowed to sue prison officer for negligence even though California state law would provide immunity for state officials on those facts). The court rejects J-M's argument that these cases govern the court's consideration of the government's liability here. *See* Plaintiff's Memorandum in Opposition, filed 7/30/84 at 25.

[5] J-M takes conflicting positions on which state laws are applicable to the government in this case. At one point, in discussing California's conflict of interest laws, J-M argues that the government's negligent acts or omissions occurred in Washington, D.C., where governmental decision were being made. Plaintiff's Opposition, filed 7/30/84 at 44. This reasoning might lead the court to find that the appropriate state law is the law of the District of Columbia. J-M also strenuously argues that this court should apply the general tort law of California in evaluating its claims. *See e.g.*, Plaintiff's Supplemental Memorandum, filed 10/1/84 at 48-52 (court should apply California's Good Samaritan law). Moreover, J-M argues that the court should apply California's conflict of law rules

J-M asserts two types of claims against the government: claims based on the government's breaches of tort duties it allegedly owed directly to J-M, and a claim for equitable indemnity. Under a rule 12(b)(6) motion, the court will not dismiss a claim unless it appears that the plaintiff can prove no facts that support a claim for relief. *Church of Scientology of California v. Flynn*, 747 F.2d 694, 696 (9th Cir. 1984). With the admonition in mind that a court should be reluctant to use rule 12(b)(6) to eliminate novel legal theories, *Sherman v. St. Barnabas Hospital*, 535 F. Supp. 564, 572 (S.D.N.Y. 1982), the court evaluates each of J-M's claims. The court starts first with J-M's claims that the government breached duties owed directly to J-M.

Claims One through Three:

J-M argues that, in its first three claims, it alleges breaches of duties that the United States owed directly to J-M; that J-M is not suing derivatively for breaches of duties running solely to Robinson. Therefore, J-M argues, any workmen's compensation law, either the Longshoremen and Harbor Workers' Compensation Act or California workmen's compensation law, is inapplicable to this case. The only applicable law is general tort law of California.

In Claim One, J-M alleges that the government had a duty to "investigate, evaluate, report, and disclose the

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in reaching a decision to apply federal maritime law. Plaintiff's Opposition at 44; Plaintiff's Supplemental Memorandum at 24.

Under the FTCA, the court must decide "where the negligent act or omission occurred and not where the negligence had its 'operative effect' (i.e. the situs of the injury.)" *Roberts v. United States*, 498 F.2d 520, 522 n.2 (9th Cir. 1974). Bad acts or omissions on the part of the government may have occurred all over the United States, but J-M is complaining here about the alleged actions occurring at two naval bases in California where the government's alleged failure to warn and supervise John Robinson was the proximate cause of the harm J-M suffered in this case. The court, therefore, looks to and applies California law.

potential risks associated with installation or removal of asbestos-containing materials in the Navy shipyards," J-M's First Amended Complaint, ¶ 53, and that the failure of the government to carry out this duty caused the injuries allegedly sustained by Robinson. J-M thus maintains that it is "entitled to receive from the United States any damages sustained by Johns-Manville in connection with the *Robinson* case." *Id.* at ¶ 54.

In Claim Two, J-M claims that the government had exclusive control over the asbestos product specifications and knowledge, superior to J-M's, of the risks involved for workers using asbestos. This exclusive control and superior knowledge gave rise to an implied tort duty to indemnify J-M for any damages that resulted from J-M's compliance with these government specifications. J-M alleges that the money it paid out to Robinson in settlement is included within these damages that the government had a duty to indemnify.

Finally, in Claim Three, J-M alleges that the government impliedly warranted that it would use the asbestos-containing materials in its shipyards in a "safe manner designed to prevent exposure to excessive concentrations of asbestos, and in a manner designed to conform with recognized and Government adopted standards and safe work practices." *Id.* ¶ 61.

The government also allegedly warranted that it would indemnify J-M for any claims it paid to workers such as Robinson, who were allegedly injured as a result of the government's negligent utilization of the asbestos materials. J-M alleges that the government committed tortious ("negligent") breaches of these warranties, and that J-M is entitled to full indemnity of the amount it paid to Robinson. *Id.* at ¶ 63.

In support of these claims, J-M points to a number of facts which, under this motion, the court must take as true. *Church of Scientology of California v. Flynn*, 744 F.2d 694, 696 (9th Cir. 1984). First, J-M alleges that,

during World War II and in the years thereafter, it was required by law to enter into contracts for the supply of asbestos-containing materials for use in the construction, conversion, or repair of Navy vessels. First Amended Complaint at ¶¶ 12, 13. Second, J-M alleges that the government participated in the design and specification of these materials. *Id.* at ¶ 13. Third, J-M alleges that the government established its own standards based on superior knowledge of the health hazards of asbestos, for the safe use of asbestos. *Id.* at ¶¶ 14-21. But, the government allegedly failed to enforce its own safety standards. *Id.* at ¶ 22. And fourth, J-M alleges that the government had exclusive control over working conditions in the navy shipyards and at times (particularly during 1964-66) blocked J-M's efforts to present its asbestos-related safety programs to employees of government shipyards. *Id.* at ¶¶ 22-50.

The court analyzes J-M's claims under California tort law,[6] and finds that J-M's allegations do support a cause

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[6] This is the analysis the district court in Maine used when confronted with the claims by a group of asbestos manfacturers, defendants in suits by various persons who worked with asbestos, against the United States for a series of alleged breaches of duties the government owed the manufacturers. The district court in Maine evaluated the manufacturers' claims against the government under Maine tort law, and dismissed most of the manufacturers' claims for failure to state claims. *In Re All Maine Asbestos Litigation*, 581 F. Supp. 963 (D.Me. 1984).

In the *All Maine Asbestos Litigation*, case, the court said that the asbestos manufacturers had stated a cause of action against the government on a Good Samaritan theory. The manufacturers sought indemnity for claims by government shipyard workers on the theory that, "by undertaking to conduct studies, surveys and experiments designed to protect the health and safety of asbestos workers, who relied on the United States' actions to their detriment, the United States assumed a duty to provide warnings and otherwise exercise reasonable care to protect those workers." *All Maine Asbestos Litigation, supra*, 581 F. Supp. at 977-78.

The court went on to hold that summary judgment against the manufacturers on this count was warranted, because there was no

of action that sounds in tort. J-M must prove that the government forced J-M, under the threat of civil and criminal sanctions, to supply asbestos that conformed to government specifications, and that the government had knowledge, superior to that of J-M's that asbestos was harmful to the safety of its workers. Furthermore, J-M must show that the government failed to implement safety procedures to protect its workers.

While no California tort principles neatly fit the facts alleged in this case, the court looks to California law to impose upon the government a duty to act with reasonable care towards J-M. The court relies on analogies from the California law of special relationships to find legal support for J-M's claims in counts one through three. The court concludes that the defendant created a special relationship with J-M when it allegedly required J-M, under penalty of law, to supply products the defendants knew to be dangerous to its workers.

"[T]he common law, reluctant to impose liability for nonfeasance, generally does not impose a duty upon a defendant to control the conduct of another . . . [citations omitted], unless the defendant stands in some *special relationship* either to the person whose conduct needs to be controlled or to the foreseeable victim of such conduct." *Johnson v. County of Los Angeles*, 143 Cal. App. 3d 298, 191 Cal. Rptr. 704 (1983). In *Johnson*, the County Sheriff arrested the decedent for driving on the wrong side of the freeway in an attempt to commit suicide. Shortly after the arrest, plaintiff, the decedent's wife, informed the defendants that the decedent was a paranoid schizophrenic who had suicidal tendancies and required immediate care. She also told defendants that the decedent should not be released. The defendants assured plaintiff that they would hospitalize decedent and that she

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evidence that the workers were aware or ever relied on any health and safety surveys or studies the government was doing. *Id.* at 978-79.

should not worry. *Id.* at 304, 191 Cal. Rptr. at 707. The defendants, however, released the decedent without informing the plaintiff, and two days later he committed suicide. The court in *Johnson* concluded that "Sheriffs here stood in a special relationship to Decedent and to Appellants, and had a duty to warn Appellants before releasing Decedent." *Id.*

In order to establish this special relationship, J-M must establish, at a minmum, the foreseeability of the harm. *Johnson v. County of Los Angeles, supra*, 143 Cal. App. 3d at 308, 191 Cal. Rptr. at 710 (1983). Here, J-M has alleged facts that would show foreseeability, if the government knew of the harms associated with asbestos, knew that it could take safety precautions to avoid the harm, and knew that Robinson could sue J-M for harm done to him by the asbestos.

That J-M was a reasonably foreseeable victim is not alone sufficient to establish the special relationship. *Davidson v. City of Westminster*, 32 Cal.3d 197, 209, 649 P.2d 894, 898, 185 Cal. Rptr. 252, 258 (1982). In *Davidson*, the California Supreme Court held that the police had no duty to warn a husband and wife in a laundromat of the presence of a person the police suspected of previous stabbings, even though the police had this suspect under surveillance in the laundromat with the couple. *Id.* at 210, 649 P.2d at 900, 185 Cal. Rptr. at 258. The suspect eventually stabbed the wife, but the court said it would not impose a duty to warn on the police, even though the wife was a reasonably foreseeable victim, because the police had not placed the wife in danger and the couple did not rely on the protection of the police when they went into the laundromat.

The Court explained, "a finding of special relationship does not require a promise or reliance thereon in order to impose a duty of care." *Id.* at 207, 649 P.2d at 899, 185 Cal. Rptr. at 257. But, in order to impose a duty to protect, the defendant must either place the plaintiff in

danger or act in such a way so that the plaintiff becomes dependant upon the defendant. *Id.* at 208, 649 P.2d at 900, 185 Cal. Rptr. at 258.

Here, J-M has alleged that, by forcing it to supply asbestos, the government had a duty to J-M to see that it would not suffer injury from a danger that the government created. J-M was clearly dependant upon the government because it was compelled to supply asbestos to the government for ships upon which Robinson was eventually to work.

The court recognizes that the special relationship doctrine does not fit the typical manufacturer-supplier relationship because the parties in the typical situation consent to deal with each other and presumably can negotiate contractual provisions to protect themselves.[7] Hence, the parties do not need the protection of tort law, that imposes duties of reasonableness upon people whether they agree explicitly to such restraints or not. Rather, to the extent that the government required J-M to supply asbestos, J-M was not like an ordinary supplier who sold his products voluntarily to the buyer and who could freely negotiate contract terms. The facts alleged in the case at bar are analogous to the case in which one side in a contractual relationship has oppressive bargaining power, and uses this power unfairly in the bargaining process or to obtain unconscionable terms in the contract. In such situations,

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[7] *Cf., Santisteven v. Dow Chemical Company*, 506 F.2d 1216, 1219 (9th Cir. 1974). In this case, a copper company employee, who was seriously injured while using flake caustic soda, brought a personal injury action against the supplier of the chemical. The supplier then filed suit against the copper company claiming that the copper company had a duty to the supplier to avoid subjecting the supplier to tort liability. In rejecting this theory, the Ninth Circuit held simply that "indemnity does not work in this way." *Id.* The court stated that "in the absence of a specific legal relationship (e.g. master-servant) or contract-type obligation, indemnity is triggered not by "an abstract duty owed a third party" but only when it is more just to shift the burden of loss. *Id.*

the California legislature directs the courts to refuse to enforce unconscionable contract terms. Cal. Civil Code § 1670.5 (codifying the Uniform Commercial Code's unconscionability section 2-302, and applying it to all contracts, not just sale of goods contracts). The doctrine represents the public policy against oppressive contractual relationships.

J-M's Third Claim is also based on tort duties that arise from an implied-in-fact contractual relationship. J-M alleges that the facts of the government's participation in the design and specification of the asbestos-containing products, its representations as to the safe use of the products, its failure to allow J-M to present certain safety programs at the naval bases, and the assurances that the government was handling safety matters adequately, all support a claim of implied contractual indemnity. In other words, J-M could have interpreted this government activity as a signal that the government was assuming responsibility for worker safety, that J-M was relieved from further duty relating to safety, and that the government would indemnify J-M for any damage caused by the government's failures in providing for its workers' safety.

Under California law, an obligation to indemnify may arise from either of two general sources: "First, it may arise by virtue of express contractual language establishing a duty in one party to save another harmless upon the occurrence of specified circumstances. Second, it may find its source in equitable considerations brought into play either by contractual language not specifically dealing with indemnification or by the equities of the particular case." *E.L. White, Inc. v. City of Huntington Beach*, 21 Cal.3d 497, 506-07, 579 P.2d 505, 510, 146 Cal. Rptr. 614, 619 (1978); *Rossmoor Sanitation Inc. v. Pylon Inc.*, 13 Cal.3d 622, 628, 532 P.2d 97, 100, 119 Cal. Rptr. 449, 452 (1975).

Defendant argues in its Reply Memorandum that, to the extent J-M's Claims One, Two, and Three are based on a contractual theory, J-M has not alleged proper jurisdiction in its First Amended Complaint. Government's Reply, at pp. 23, 25, 26. Specifically, defendant argues that an action based on a contract must be brought under the Tucker Act, 28 U.S.C. § 1346(a)(2) and § 1491. Defendant maintains that as J-M does not allege Tucker Act jurisdiction, J-M's claims must be dismissed. This argument, however, misunderstands J-M's theory. J-M alleges that a tort duty resulted from the relationship of the parties. California courts have long recognized that a "wrongful act committed in the course of a contractual relationship may afford both tort and contractual relief, and in such circumstances the existence of the contractual relationship will not bar the injured party from pursuing redress in tort." *Tameny v. Atlantic Richfield Co.*, 27 Cal.3d 167, 174-75, 610 P.2d 1330, 1334, 164 Cal. Rptr. 839, 843 (1980). It is well-established law in California "that if the cause of action arises from a breach of promise set forth in the contract, the action is ex contractu, but if it arises from a breach of duty growing out of the contract, it is ex delicto." *Id.*, quoting *Eads v. Marks*, 39 Cal.2d 807, 811, 249 P.2d 257, 260 (1952).

The purpose of imposing tort duties upon contracting parties is to implement fundamental public policy. *Tameny v. Atlantic Richfield Co.*, *supra* at 176, 610 P.2d at 1335, 164 Cal. Rptr. at 174-75. In *Tameny*, the California Supreme Court recognized the policy of protecting employees who refuse to obey employer's instructions to violate the law. The court held that an employer who threatens to or discharges an employee for refusing to violate anti-trust laws, wrongfully encourages an employee to violate his duty to obey the law. Thus, an employee who is fired for refusing to violate anti-trust laws may maintain a tort action for wrongful discharge and is not limited to suing for breach of contract. *Id.* at 178, 610 P.2d at 1337, 164 Cal. Rptr. at 846.

While California courts have never recognized such a duty in a buyer-seller relationship, J-M did not have a typical buyer-seller relationship with the government. The fundamental public policy in this case is represented in the policy against unconscionability in contractual relationships. As stated above, the California legislature has extended the U.C.C.'s unconscionability doctrine to all contracts. And prior to the enactment of Cal. Civil Code § 1670.5 in 1979, "[u]nconscionability ha[d] long been recogized as a common law doctrine which [was] consistently applied by California courts in the absence of specific statutory authorization." *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 484, 186 Cal. Rptr. 114, 121 (1982). Thus, the facts J-M alleges support a cause of action under this tortious breach of an implied contractual provision also.

The duty on the part of the government that the court finds here is limited to injury J-M suffered by way of lawsuits caused by asbestos J-M was forced by law to supply to the government, not from asbestos J-M voluntarily contracted to supply. It appears, however, that Robinson was not working during the time J-M had a mandatory obligation to provide asbestos. But, counsel for J-M suggested at oral argument that Robinson worked to refit ships and remove asbestos that had been installed the time J-M was under legal obligation to supply asbestos. The court will treat defendant's motion to dismiss as a motion for more definite statement as to the causal element in counts one through three. *See Burkhead v. Phillips Petroleum Co.*, 308 F. Supp. 120, 123-24 (N.D. Cal. 1970). The court grants J-M thirty days to amend its pleading to alleged explicitly this fact of causation.

To the extent that J-M alleges harm caused by asbestos it supplied as part of a contractual relationship entered into freely, the court finds J-M does not state a cause of action that sounds in tort. The concerns the court has about the element of coercion are not present when J-M

chooses to enter into contracts to sell asbestos to the government, especially after 1964, when by J-M's own pleading, it realized the dangers of asbestos. J-M's first amended complaint ¶ 49. Rather, J-M is left with its claim for equitable indemnity, as set forth below.

Claim Four: Equitable indemnity:

J-M's fourth claim seeks equitable indemnity from the government for its alleged negligence towards Robinson on two grounds. First, J-M argues that the government breached a duty of care to Robinson, as Robinson's employer, and therefore J-M is entitled to partial equitable indemnification for the portion of the government's fault. J-M also contends that the government breached a duty of care it owed to Robinson in its role as the owner of the vessels upon which Robinson worked.

The court begins it discussion of third-party suits against the United States with the 1983 Supreme Court decision of *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983). In *Lockheed*, the Supreme Court rejected the argument that the exclusivity provision of the Federal Employee Compensation Act (FECA) barred third party indemnity suits against the United States. The FECA prohibits "actions against the United States by an employee, his legal representatives, spouse, dependents, next of kin, [or] any other person otherwise entitled to recover damages from the United States . . . because of the [employee's] injury or death." 5 U.S.C. § 8116(c).

In *Lockheed*, the Lockheed Aircraft Corporation sought indemnity from the United S...tes for a settlement Lockheed had reached with a federal employee who was injured in a Lockheed airplane. The Court reviewed the language of the FECA exclusivity provision, the legislative history, and public policy underlying the FECA. The Court found that the *quid pro quo* present in the FECA, and all worker compensation legislation—in which

employees are guaranteed immediate fixed benefits in return for the right to sue the government—did not operate to bar third parties from suing the government. Under the FECA, these third parties received no *quid pro quo* in exchange for giving up the right to sue the government. *Id.* at 198.

It is important, however, to remember that *Lockheed* does not confer upon a third party a right to sue, rather the Supreme Court just said that the FECA does not present a bar to third-party suits. *Id.* As the Court explained, the issue of the substantive law of indemnity was not before the Court. *Id.* at 197, n.8. Thus, the plaintiff must affirmatively establish that it has a valid theory for indemnification.

To establish affirmatively its claim, the FTCA requires J-M to show that a private person in similar circumstances would be liable to J-M. The California Supreme Court, in *American Motorcycle Association v. Superior Court of Los Angeles*, 20 Cal.3d 578, 591, 578 P.2d 899, 907, 146 Cal. Rptr. 182, 190 (1978), held that California's equitable indemnity law is to be based on a comparative negligence concept. The co-defendant tortfeasors remain jointly and severally liable to the plaintiff, but may apportion damages among themselves on a percentage fault basis. Of course, J-M may obtain equitable indemnity from the government only if J-M can show that the government could have been liable to Robinson.

It is clear that the government, as a private employer in the state of California or under the Longshoremen and Harbor Workers' Compensation Act, ordinarily would not be liable to Robinson in a tort action. He is limited to recovering workmen's compensation. 33 U.S.C. § 905(a); Cal. Labor Code § 3684. J-M has two theories, however, on which to argue that the government, as a private employer in California, could be held liable to Robinson. The court examines each of J-M's arguments in turn.

1. Government as a vessel owner:

Both parties agree that, if the government were a private employer in this case, the Longshoremen and Harbor Workers' Compensation Act (LHWCA) would apply.[8] The Supreme Court has said that, if the employer also owns the vessel on which the employee is injured, the LHWCA allows the employee to sue the employer in negligence, not in his capacity as employer, but as the vessel owner. *Jones & Laughlin v. Pfiefer*, 462 U.S. 523, 532 (1983). The Court allowed this action because § 905(b) of the LHWCA preserves the employee's right to sue a vessel owner for negligence. The Court reasoned that the employer, as vessel owner, should not escape the effect of this statutory provision merely because it also happens to be the employer. *Id.*

Treating the government as a private employer under the LHWCA, Robinson could have sued the government-employer under a negligence theory. In turn, this underlying liability allows J-M to sue the government for equitable indemnity, unless some other bar to J-M's recovery exists. The government asserts two potential bars to J-M's recovery. First, the government argues that § 905(a) of the LHWCA is an exclusivity provision that absolutely bars J-M's third-party suit. Section 905(a) provides that, "[t]he liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover

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[8] Both parties agree that the LHWCA would apply if the court treated the government as a private shipyard employer in California. Government's Memorandum in Support, filed 5/14/84 at 8. Plaintiff's Memorandum in Support, filed 7/30/84 at 30. The LHWCA covers "any harborworker including a ship repairman, shipbuilder, . . ." 33 U.S.C. § 902(3). Robinson worked as an insulator in ships in dry dock.

damages from such employer at law or in admiralty on account of such injury or death."

The LHWCA's exclusivity provision is virtually identical to the exclusivity provision of the FECA that was the subject of the *Lockheed* decision. As the government did in *Lockheed* with regard to the FECA, the government argues here that this exclusive remedy provision bars J-M's third party suit. The government attempts to distinguish *Lockheed* by saying that in this case, the legislative history of the 1972 LHWCA amendments, of which § 905(a) was one, shows that Congress intended to bar third-party indemnity suits.

The court reads the legislative history differently. The legislative history reveals that Congress intended to bar *vessel owners* from being indemnified from stevedore-employers for money damages that the vessel owners paid out to the longshoremen-employees injured by the vessel owner's negligence. In return, however, Congress shielded the *vessel owners* from suits by longshoremen on a seaworthiness strict liability doctrine. That is, longshoremen can only sue the vessel owners on a negligence theory, though prior to 1972, the Supreme Court had said they could sue vessel owners on a seaworthiness theory. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946).

It is clear from the legislative history of the 1972 amendments that Congress was concerned with balancing the duties and liabilities among these three specific parties. The legislative history does not show that Congress had other third parties in mind when it was considering barring suits for indemnity against the stevedore-employer.

Apparently, the only court to have considered whether the LHWCA bars indemnity suits by third parties other than vessel owners, decided that the *Lockheed* decision provides that the indemnity action is not barred. *Austin v. Johns-Manville Sales Corp.*, Civil No. 78-122 P, bench

ruling (March 9, 1984). The court in *Austin* had originally ruled that the LHWCA did bar manufacturers' indemnity suits against employers, 508 F. Supp. 313 (D.Me. 1981), but reversed itself in light of *Lockheed*.

In *Lockheed*, the Supreme Court commented on the LHWCA, by way of contrast with the FECA, and noted that Congress abolished the third-party indemnity action only in conjunction with a *quo pro quo* to benefit the third party. The only third party that benefits under the LHWCA, however, is the vessel owner. A manufacturer, such as J-M, may still be liable to an employee on a strict liability theory. In fact, Robinson's complaint, attached as Exhibit B to Plaintiff's Memorandum in Opposition, filed 7/30/84, pleads a claim that sounds in strict products liability. (Robinson's third cause of action). In *Lockheed*, the fact that Congress had provided no *quid pro quo* in the FECA compensation scheme for the third party was grounds for the Court to refuse to bar the third party's claim against the United States. The same result is warranted here.[9]

The government also argues that the exclusivity provision of the California workmen's compensation act bars J-M's recovery in this case. Under California law, if an employee is injured in the scope of his employment, Labor Code § 3864 "normally precludes a third party tortfeasor from obtaining indemnification from the employer, even if the employer's negligence was a concurrent cause of the injury." *American Motorcycle Association v. Superior Court*, 20 Cal.3d 578, 607 n.9, 578 P.2d 899, 917-18 n.9, 146 Cal. Rptr. 182, 200, n.9 (1978); *E.B. Willis Co., Inc.*

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[9] The government points to a recent amendment to § 905(b) of the LHWCA that prohibits the employee from suing the vessel owner who is an employer on a negligence theory. The fact that Congress passed this amendment, to overrule *Jones & Laughlin*, serves to show that Congress recognized that the court's interpretation of the LHWCA, in effect during the time relevant to this case, is correct.

v. Superior Court of Merced County, 56 Cal. App. 3d 650, 654, 128 Cal. Rptr. 541, 542 (1976) (under Labor Code § 3864, employer only required to indemnify a third party if there is an express indemnification agreement).

The answer to the government's argument on California workmen's compensation law turns on an analysis of J-M's claim that California workmen's compensation law would allow Robinson to sue an employer covered under such law. The court considers J-M's argument below.

2. Government as a co-manufacturer:

J-M alleges that the government could be held liable to Robinson based on California's "dual capacity doctrine." [10] *See* Plaintiff's Supplemental Memorandum, filed 10/1/84 at 35-39. This doctrine allows the employee to sue an employer whose acts, done in a legal capacity other than as employer, cause injury to the employee. *Shields v. County of San Diego*, 155 Cal. App. 3d 103, 109, 202 Cal. Rptr. 30, 34 (1984). As applied to an employer-manufacturer, it affords an injured employee, statutorily entitled to a workmen's compensation award, a separate remedy against the employer when the injury results from an act or omission of an employer and is inflicted in a relationship distinct from that of employer-employee. Thus, an employer whose employee is injured when using a defective device manufactured by an employer, is liable for breaching a duty toward the employee that differs from the duty created by the employer-employee status. *Id.*; *Bell v. Industrial Vagas, Inc.*, 30 Cal.3d 268, 282, 673 P.2d 266, 273, 179 Cal. Rptr. 30, 39 (1981); *Franco v. United Wholesale Lumber Co.*, 148 Cal. App. 3d 981, 983, 196 Cal. Rptr. 430, 431 (1984).

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[10] The California legislature eliminated the employee's right to pursue actions under the dual capacity doctrine, by amending the Labor Code § 3602. This section did not go into effect until January 1, 1983, and does not affect cases that arose before that date. *Franco v. United Wholesale Lumber Co.*, 148 Cal. App. 3d 981, 983 n.1, 196 Cal. Rptr. 430, 431 n.1 (1984).

In applying the dual capacity doctrine to an employer-manufactuer, the courts focus on "whether the manufacturer sells the defective product to the general public." *Nicewarner v. Kaiser Steel Corp.*, 143 Cal. App. 3d 31, 37, 191 Cal. Rptr. 522, 525-26 (1983). In *Nicewarner*, a plaintiff-employee, acting within the course and scope of his employment, was injured when an improperly connected steel beam fell fifteen feet to the ground. The steel beam was specifically fabricated by the products division of the employer, Kaiser Steel Corporation, and the plaintiff alleged the beam was "not unique in that it was generally of a size and design regularly fabricated by [Kaiser] and stockpiled for sale to the public." *Id.* at 34, 191 Cal. Rptr. at 524.

The court explained that the dual capacity exception only applies if the plaintiff can show: 1) the defendant does manufacture the product for sale to the public, and 2) the risk thereby created is the same as the one which the plaintiff was exposed. *Id.* at 40, 191 Cal. Rtpr. at 522. The plaintiff in *Nicewarner* failed because he could not show that the risk of injury that befell him, from the improper connection, was one that the public faces when using the steel beam.

J-M's allegations that the United States was liable to Robinson under the dual capacity doctrine cannot pass the *Nicewarner* analysis. While the United States allegedly aided in the design and arguable the manufacture of the asbestos-containing products, J-M does not allege that the United States ever sold these products to the general public at either the wholesale or retail level. It is only through the manufactur and sale of the asbestos-containing products that the United States could be exposed to liability under the dual capacity doctrine. The court, then, must grant the United States' motion to dismiss claim four to the extent that it is based on the gov-

ernment's liability to Robinson in its capacity as manufacturer.[11]

CONCLUSION:

For the foregoing reasons, the court hereby:

1. DENIES the defendant's motion to dismiss claims one, two, and three, to the extent that J-M alleges that it was forced, under threat of civil and criminal penalties, to supply asbestos to the government,

2. GRANTS the plaintiff 30 days to amend its complaint to allege explicitly facts to show how the asbestos J-M was forced to supply to the government caused harm to Robinson,

3. GRANTS the defendant's motion to dismiss claim one, two, and three, to the extent that these claims rest on sales of asbestos J-M made to the government voluntarily, and

4. DENIES the defendant's motion to dismiss claim four to the extent it claims indemnity for the government's liability to Robinson in its capacity as vessel owner.

IT IS SO ORDERED.

DATED: August 20, 1985

/s/ Robert F. Peckham
Chief United States
District Court Judge

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[11] In the case of *In Re All Maine Asbestos Litigation*, 598 F. Supp. 1571 (D.Me. 1984), the court did not dismiss a claim by the asbestos manufacturers that is very similar to J-M's claim here. In Maine, the defendant asbestos manufacturer sought indemnity from the government for its negligence towards employees in its capacity as vessel owner. *Id.* at 1575. The district Court in Maine did not dismiss the claim because it was not clear whether the Maine courts would accept a dual capacity theory. *Id.* at 1576. The court said it would consider a motion for certification to the Maine Supreme Court.

Unlike Maine law, however, the California courts have defined and discussed the dual capacity doctrine, and it is clear that, if presented with the allegations in this case, the California courts would not allow Robinson to sue his employer as a co-manufacturer.

CERTIFICATE OF SERVICE BY MAIL

I, the undersigned deputy clerk, declare under penalty of perjury that I served the following document(s) as listed below by enclosing a true copy of said document(s) in a separate postage paid, sealed envelope and today placing the said envelope in a regularly maintained United States Postal Service mail depository in the City and County of San Francisco, California, addressed as follows:

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1) ORDER RE MOTION TO DISMISS

DATED: August 21, 1985

/s/ [Illegible]
Deputy Clerk

APPENDIX L

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

CV No. 79-0382, et al.

IN RE ALL ASBESTOS CASES

ORDER ON MOTION FOR
RECONSIDERATION

This is a motion by third-party defendant United States for partial reconsideration of the Memorandum Decision and Order, filed October 10, 1984 (the "Order"). Reconsideration is sought of that portion of the Order denying the motion to dismiss third-party plaintiffs' contribution claims based upon the alleged negligence of the government as vessel owner.

The Order (p. 6) cites *United States* v. *Standard Oil Co.*, 495 F.2d 911 (9th Cir. 1974), for the proposition that "contribution may be had against a person where the original plaintiff could have enforced liability against him." The United States argues that although a non-government employee could sue the United States for negligence as vessel owner, the same is not true for government employees who are plaintiffs in these cases. The Federal Employees' Compensation Act ("FECA") provides the sole avenue of relief for government employees suffering the type of injury complained of here. 5 U.S.C. § 8116(c). Thus, the United States argues, since FECA bars direct suit by government employees in this instance, third party suits for contribution are similarly barred, relying on *Johansen* v. *United States*, 343 U.S. 427 (1952), for support.

The Court must agree that the portion of the Order which is of concern to the United States might have been drafted more artfully; however, its meaning and intent could not have escaped counsel's attention. With respect to liability under Part I.A.1(a), the Order held that under the Federal Tort Claims Act the United States' liability is to be judged by the same standard applicable to a private person; therefore, that FECA's exclusivity provision could not act as a bar. Thus, the discussion in that part was predicated on the assumption that the United States is to be treated as a private employer. This is certainly consistent with, if not mandated by, *Lockheed Aircraft Corp.* v. *United States*, 103 S.Ct. 1033 (1983), which the motion for reconsideration studiously ignores.

The second sentence in the paragraph at lines 9-18, page 6, of the Order would have been clearer, had it read as follows:

> Because, *if the United States had been a private employer*, plaintiffs could have sued the United States for negligence as a vessel owner under *Jones & Laughlin*, these "*Scindia* claims" also are available to third-party plaintiffs as claims for contribution.

It is ordered that the Order be amended by adding thereto the underlined phrase "if the United States had been a private employer," between the words "Because" and "plaintiffs" at page 6, line 14, thereof.

The motion for reconsideration is denied.

Dated Nov. 20, 1984

/s/ A. Wallace Tashima
A. WALLACE TASHIMA
United States District Judge
Central District of California
Sitting by Designation

(3) (2)

Nos. 85-1253 and 85-1288

In the Supreme Court of the United States

OCTOBER TERM, 1985

EAGLE-PICHER INDUSTRIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

RAYMARK INDUSTRIES, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether manufacturers of asbestos products sued by shipyard workers who contracted asbestos-related diseases may bring third-party suits seeking contribution and indemnity from the United States, which was the employer of the shipyard workers and the owner of the vessels on which the workers were exposed to asbestos.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes:

Statutes—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1253

EAGLE-PICHER INDUSTRIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

No. 85-1288

RAYMARK INDUSTRIES, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a)[1] is reported at 772 F.2d 1023. The opinions of the district court (Pet. App. 18a-26a, 27a-58a) are reported at 589 F. Supp. 1571 and 581 F. Supp. 963.

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[1] "Pet App." citations are to the appendix to the petition in No. 85-1253.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1985. A petition for rehearing was denied on October 30, 1985 (Pet. App. 90a-91a). The petitions for a writ of certiorari were filed on January 24 and January 28, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arose out of suits brought by more than one hundred present or former civilian employees of the United States Portsmouth Naval Shipyard or by their survivors against petitioners and other manufacturers of asbestos products. Plaintiffs alleged that the shipyard workers suffered disability or wrongful death as a result of exposure to asbestos contained in petitioners' insulation products used at the shipyard.[2] Plaintiffs did not sue the United States. Since the shipyard workers were government employees, plaintiffs' exclusive remedy against the United States was under the Federal Employees' Compensation Act (FECA), which provides no-fault compensation for work-related injury or death. 5 U.S.C. 8101, 8116(c). Petitioners, however, brought this third-party action against the United States, alleging nine claims for relief.[3] Pet. App. 2a-3a.

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[2] The shipyard workers included members of various trades. Plaintiffs allege that the shipyard workers were exposed to asbestos dust when insulation containing asbestos was cut, which occurred both in workshops on land and aboard ships, and when old insulation was ripped out of ships. The plaintiffs claim that petitioners failed to warn of the products' dangers or take other precautions to prevent injury to the shipyard workers.

[3] Petitioners' model third-party complaint is set forth at Pet. App. 94a-107a.

2. In 1984 the district court dismissed all the third-party claims against the United States except for those claims contained in Count VI of the complaint (Pet. App. 55a-58a). Count VI alleged that the United States, as operator of the Portsmouth Naval Shipyard and owner of the vessels on which the shipyard employees worked, failed to warn the workers about the dangers of exposure to asbestos or take other steps to protect the plaintiffs (*id.* at 102a-104a). In denying the government's motion to dismiss Count VI, the district court began by noting (*id.* at 22a) that, under the Federal Tort Claims Act (FTCA), the United States is subject to liability "in the same manner and to the same extent as a private individual under like circumstances" (28 U.S.C. 2674).[4] The court reasoned that a private individual under like circumstances is "a compensation-paying private shipyard employer in Maine" (Pet. App. 23a). The court concluded that the United States could not be sued by petitioners "in its capacity as an employer" because it was clear, under the Maine Workers' Compensation Act (MWCA), that an employer who paid compensation to an employee could not be sued directly in its capacity as employer and was also immune from third-party claims for contribution or indemnity (*ibid.*).

However, the district court concluded that Maine law is unclear as to whether an employer could be sued under a "dual capacity" theory. Under such a theory, an employer may be liable to its employees

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[4] The district court also noted (Pet. App. 22a) that 28 U.S.C. 1346(b) provides that the United States is liable "under circumstances where * * * a private person[] would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

and hence to third parties in some other capacity, such as its capacity as the owner of the property on which the employee was injured, even though an action against it as employer is barred by the exclusivity provision of a workers' compensation law. Because the court thought that it was unclear whether Maine courts would recognize a dual capacity theory, it did not dismiss Count VI, which alleged that the United States is liable in its capacity as owner of the vessels on which the employees worked.[5] The court determined that the proper course would be to certify the state law question to the Supreme Judicial Court of Maine, but that certification should not occur until after trial. Pet. App. 24a-26a. The district court then certified for interlocutory appeal all its rulings on the government's motion to dismiss (*id.* at 108a-109a).

3. The court of appeals agreed to review the district court's rulings as to Count VI (Pet. App. 110a), which it construed as including a claim that the United States is subject to suit in its capacity as

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[5] The court rejected the United States' argument, based on *Patterson* v. *United States*, 359 U.S. 495, 496 (1959), and *Johansen* v. *United States*, 343 U.S. 427, 436-440 (1952), that it did not matter whether Maine law would permit a dual capacity suit against an employer covered by the MWCA because the exclusivity provision of the FECA, 5 U.S.C. 8116 (c), bars suit against the United States in its capacity as vessel owner. The court stated that "[t]he relevant inquiry under the FTCA must be as to whether a private shipyard employer in Maine would be subject to liability to its employees for negligence in its capacity as a vessel owner. Such a private shipyard would not be protected by the *Johansen*/*Patterson* doctrine because the shipyard would not be covered by the FECA." Pet. App. 25a.

employer as well as a claim that the United States is liable in its capacity as vessel owner (*id.* at 6a).[6]

a. The court of appeals held that the district court had correctly dismissed the third-party tort claims against the United States in its capacity as employer (Pet. App. 7a-10a). The court relied on its decision in *Drake* v. *Raymark Industries, Inc.*, 772 F.2d 1007 (1st Cir. 1985), petition for cert. pending, No. 85-1246 (Pet. App. 59a-89a), where it held that a compensation-paying private shipyard owner in Maine is not subject to a third-party tort action brought by asbestos manufacturers (Pet. App. 9a).

In *Drake*, the court of appeals concluded that a private shipyard owner in Maine is subject to concurrent jurisdiction under the Maine Workers' Compensation Act, Me. Rev. Stat. Ann. tit. 39, §§ 1 *et seq.* (1978 & Supp. 1985), and the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. (& Supp. I) 901 *et seq.*, each of which contains an exclusivity provision barring tort actions against employers. Me. Rev. Stat. Ann. tit. 39, § 4 (Supp. 1985); 33 U.S.C. 905(a). The court rejected the asbestos manufacturers' contention that under *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190 (1983), their third-party claims against the private shipyard were not barred by the exclusivity provisions of the applicable workers' compensation laws. The court of appeals explained that while the Court had held in *Lockheed* that the exclusivity provision of the FECA did not itself bar a third-party tort suit, the Court also stressed that "the underlying substantive law granting Lockheed a right to indemnifi-

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[6] The court of appeals declined to review on interlocutory appeal the dismissal of the asbestos manufacturers' other claims (Pet. App. 110a-111a).

cation was uncontroverted" (Pet. App. 84a; see 460 U.S. at 197 n.8, 199). Therefore, the court of appeals concluded, even if the applicable exclusivity provisions did not bar a third-party claim, there remained the issue "whether there is a basis in substantive law for defendants' third-party action" against the private shipyard (Pet. App. 84a). The court found no basis for a third-party action. It concluded in *Drake* that "there can be no doubt that the Maine Act bars this third-party action" (*id.* at 85a) and that "contribution actions against the compensation-paying employer" are barred by the exclusivity provision of the LHWCA (*id.* at 86a). Relying on its decision in *Drake*, the court found that the asbestos manufacturers had no basis for their third-party claims against the United States in its capacity as employer in this case (*id.* at 9a).

The court of appeals also rejected the asbestos manufacturers' argument that the United States is subject to third-party suits in its capacity as employer even if a private shipyard is not subject to such suits. Even though the FTCA limits the government's liability to that of "a private individual under like circumstances," the asbestos manufacturers argued that the United States should be analogized to a private shipyard owner that is not protected from tort actions by its employees by applicable exclusivity provisions. The reason for employing such an analogy, according to the asbestos manufacturers, is that the MWCA by its terms does not apply to the United States. Pet. App. 9a, 10a. Under the asbestos manufacturers' analogy, the United States would be directly liable to the plaintiffs and therefore subject to a third-party claim for contribution or indemnity as a joint tortfeasor. The court found the asbestos man-

ufacturers' reasoning "unpersuasive" (*id.* at 10a). It concluded that the appropriate analogy under the FTCA is to a private employer under like circumstances and, since a private compensation-paying employer in Maine is not subject to a direct tort suit or to a third-party tort suit based on an injury to an employee, the United States is not subject to such suits either (*ibid.*).

b. The court of appeals then considered petitioners' argument that the United States is subject to third-party tort actions under a dual capacity theory. This Court held in *Jones & Laughlin Steel Corp.* v. *Pfeifer*, 462 U.S. 523, 528-532 (1983), that an employer subject to the LHWCA may be sued in tort by an employee under 33 U.S.C. 905(b) in its capacity as vessel owner, even though 33 U.S.C. 905(a) shields an employer from liability in its capacity as employer.[7] Petitioners argued that the United States is therefore subject to suit in its capacity as owner of the vessels in the Portsmouth Naval Shipyard because an analogous private shipyard would be subject to such a suit even if it were not subject to suit in its capacity as employer. Thus petitioners invoked Section 905(b) as the substantive law that provided the basis for a third-party action against the United States in its capacity as vessel owner.

The court of appeals first noted that federal employees are not subject to the LHWCA under 33 U.S.C. 903(a)(2). It doubted "whether we can ignore an express congressional exclusion of federal

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[7] Section 905(b) provides that "[i]n the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party * * *."

workers from coverage under the LHWCA, and employ an FTCA analogy by which coverage can be analogically presumed so as to render the United States vulnerable to a shipowner negligence suit" (Pet. App. 11a-12a). The court also noted that "where other federal policies * * * preclude what would otherwise be a potential cause of action, no action against the government may stand" (*id.* at 12a, citing *Johansen* v. *United States*, 343 U.S. 427, 436-440 (1952)), where the Court held that federal employees who receive compensation under the FECA may not sue the United States under the Public Vessels Act, 46 U.S.C. (& Supp. I) 781 *et seq.* However, the court "bracket[ed] these FTCA-based concerns" and assumed that the United States should be treated like any private shipyard (Pet. App. 13a).

Again relying on its decision in *Drake*, the court of appeals rejected petitioners' argument. The court of appeals explained in *Drake* that Section 905(b) was enacted in 1972 to replace the common law admiralty action for unseaworthiness with a statutory action governed by a negligence standard (Pet. App. 70a). Section 905(b) does not explicitly state that it provides only for *maritime* tort actions—*i.e.*, for tort actions that may be brought in the federal courts pursuant to their admiralty jurisdiction—but the court of appeals' "review of the origin and demise of longshore and harbor workers' unseaworthiness actions * * * led [it] to conclude that § 905(b) implicitly requires that a tort be consummated within the admiralty jurisdiction to be cognizable under the statute" (Pet. App. 70a).

Since it had concluded that Section 905(b) encompasses only those torts cognizable in admiralty, the court of appeals in *Drake* considered whether

tort suits based on the employees' exposure to asbestos products while working in shipyards are properly considered maritime torts. The appropriate test for determining whether a tort is a maritime tort, under *Executive Jet Aviation, Inc.* v. *Cleveland*, 409 U.S. 249 (1972), and *Foremost Insurance Co.* v. *Richardson*, 457 U.S. 668 (1982), is whether the tort "occurred on navigable waters"—a "situs test"—and bore "a significant relationship to a maritime activity"—a "nexus test" (Pet. App. 72a). The court below noted that six circuits had considered whether a shipyard worker injured by exposure to asbestos could base a tort claim against asbestos manufacturers on admiralty law, and each had concluded that such a claim was not cognizable in admiralty because the nexus test was not satisfied (*id.* at 73a-74a).[8]

The court of appeals concluded in *Drake* that no maritime tort is presented in a case involving injury to a shipyard worker caused by exposure to asbestos. The court noted that the asbestos manufacturers, who now urged that a claim by an injured shipyard worker against a vessel owner under Section 905(b) is a maritime tort, had successfully argued that those same plaintiffs' claims against asbestos manufacturers were not cognizable in admiralty (Pet. App. 76a). The court concluded that "[t]he tort cannot be outside admiralty jurisdiction when sued upon in the

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[8] The court of appeals cited *Oman* v. *Johns-Manville Corp.*, 764 F.2d 224 (4th Cir.) (en banc), cert. denied, No. 85-356 (Nov. 4, 1985); *Myhran* v. *Johns-Manville Corp.*, 741 F.2d 1119 (9th Cir. 1984); *Harville* v. *Johns-Manville Products Corp.*, 731 F.2d 775 (11th Cir. 1984); *Lowe* v. *Ingalls Shipbuilding, Inc.*, 723 F.2d 1173 (5th Cir. 1984); *Austin* v. *Unarco Industries*, 705 F.2d 1 (1st Cir.), cert. dismissed, 463 U.S. 1247 (1983); *Keene Corp.* v. *United States*, 700 F.2d 836 (2d Cir.), cert. denied, 464 U.S. 864 (1983).

primary action and then, by some magic, be transmuted into a maritime tort" (*ibid.*). Because the plaintiffs could not bring tort actions under Section 905(b) alleging injury caused by exposure to asbestos against a shipyard, the court of appeals concluded in *Drake* that there was no basis for a third-party action by asbestos manufacturers against a shipyard under that provision (Pet. App. 76a). Therefore, petitioners could not rely on Section 905 (b) to bring third-party actions against the United States in this case (Pet. App. 14a).[9]

ARGUMENT

Petitioners contend that review is warranted for two reasons. Petitioner Raymark,[10] but not petitioner Eagle-Picher, contends that the court of appeals erred in concluding that the United States is not subject to third-party actions in its capacity as em-

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[9] The court of appeals also concluded that Maine courts would not permit a suit against an employer based on its capacity as owner of the premises on which an employee was injured. The court noted that "the state courts have 'held with virtual unanimity' that workers' compensation-covered employers cannot be sued by their employees on premises liability theories" (Pet. App. 16a, quoting 2A A. Larson, *The Law of Workmen's Compensation* § 72.82, at 14-234 (1983)) and that the asbestos manufacturers had "not cited any authority that suggests that the Maine Supreme Judicial Court" would rule otherwise. Accordingly, the court of appeals saw no reason to certify a question to that court concerning whether it would permit a suit against a shipyard in its capacity as vessel owner (Pet. App. 17a). Petitioners have not challenged that part of the First Circuit's decision.

[10] Raymark's petition is joined by Owens-Illinois, Inc.; Armstrong World Industries, Inc.; Fibreboard Corporation; Owens-Corning Fiberglas Corp.; H.K. Porter Company, Inc.; Southern Textile Corporation; and Celotex Corporation.

ployer. This argument is insubstantial. Both petitioners argue that the court of appeals erred in concluding that the United States is not subject to third-party actions in its capacity as vessel owner. Contrary to petitioners' contentions, the court of appeals correctly determined that 33 U.S.C. 905(b) applies to maritime torts only and that the asbestos manufacturers' third-party claims lack a maritime nexus. The First Circuit's conclusions do not directly conflict with the holdings of any other circuit. Moreover, even if the court of appeals erred in holding that Section 905(b) is a maritime tort provision, it reached the correct result in this case because Section 8116(c) of the FECA bars direct actions against the United States, and hence third-party actions under the governing substantive law. Accordingly, further review is not warranted.

1. In its petition for a writ of certiorari in *Drake*, No. 85-1246, Raymark contends (at 35-41) that review of the court of appeals' conclusion that a shipyard is not subject to suit in its capacity as employer is warranted to resolve "confusion" over the meaning of this Court's decision in *Lockheed*. Raymark fails to understand, as the court of appeals explained in *Drake*, that "the Court stressed twice in the course of its opinion that the underlying substantive law granting Lockheed a right to indemnification was uncontroverted" (Pet. App. 84a). Accordingly, the court concluded that "*Lockheed* requires that we determine whether there is a basis in substantive law for defendants' third-party action" (*ibid.*).[11] Raymark does not attempt to identify

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[11] District courts that have considered this issue have likewise understood that it is necessary to identify a basis for a

the substantive basis for its third-party tort claim against the private shipyard in its petition in *Drake* (No. 85-1246). Because Raymark thus has not identified a basis in the underlying substantive law for its third-party claim against the United States in its capacity as employer, its claim that review is warranted to resolve confusion resulting from application of the *Lockheed* decision is unfounded.

Raymark's primary argument in its petition in this case is that the United States should be analogized under the FTCA to a private shipyard that is covered by the MWCA and the LHWCA but is not covered by the exclusivity provisions of those Acts (Pet. 28-40). Raymark contends that the United States should not be analogized to a private employer covered by the otherwise-applicable exclusivity provisions because it did not actually pay workers' compensation under those statutes (*id.* at 37). Although the United States did pay workers' compensation under the FECA, Raymark contends that that does not matter, apparently because the FECA does

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contribution or indemnity claim. *Johns-Manville Sales Corp.* v. *United States*, 622 F. Supp. 443, 451 (N.D. Cal. 1985); ("*Lockheed* does not confer upon a third party a right to sue, rather the Supreme Court just said that the FECA does not present a bar to third-party suits.") (Pet. App. 112a, 126a); *In re All Asbestos Cases*, 603 F. Supp. 599, 603 n.3 (D. Hawaii 1984) (citations omitted) ("*Lockheed* did not affirmatively confer upon third parties an indemnity remedy against the United States; rather, as the Court made clear, the existence of such a remedy is governed by the 'underlying substantive law.' "); *Colombo* v. *Johns-Manville Corp.*, 601 F. Supp. 1119, 1126 (E.D. Pa. 1984) (brackets in original) (" '*Lockheed* does not automatically entitle [a defendant] to bring an indemnity or contribution action against the United States . . . [I]t is necessary . . . to look at the . . . substantive law in each instance.' "), quoting *Prather* v. *Upjohn Co.*, 585 F. Supp. 112, 113 (N.D. Fla. 1984).

not apply to private parties. Under Raymark's analogy the United States could be sued in tort by its employees because no exclusivity provision would bar such suits. That direct liability would provide the substantive basis for third-party tort suits because the United States would be a joint tortfeasor.

Raymark's argument is obviously contrary to Congress's intention in enacting the FTCA. First, it completely overlooks the fact that Section 8116(c) of the FECA provides that the United States may not be sued by its employees. Because tort suits by its employees are barred by the FECA, the United States is properly analogized to a private party that is immune from tort suits by its employees. Therefore, the United States is not a joint tortfeasor and there is no basis for a third-party suit against the United States. Putting the FECA aside, and treating the United States the same as any private shipyard in Maine, the proper analogy would be to a private compensation-paying shipyard in Maine. Such a shipyard could not be sued by its employees because the exclusivity provisions of the MWCA and the LHWCA both bar such suits.[12] Raymark's wholly

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[12] Raymark acknowledges that most jurisdictions require joint tortfeasor status as an element of a contribution or indemnity claim, but asserts that Maine is an exception to that rule (85-1246 Pet. 13). Raymark misleadingly cites two cases that do not involve employer liability (*id.* at 13-14) and fails to cite other cases construing the exclusivity provision of the MWCA. As the court of appeals stated in *Drake*, that exclusivity provision "has been unequivocally interpreted by the Maine Supreme Judicial Court to provide a covered employer with immunity from third-party claims arising from work-related injuries to its employees that 'extends to all non-contractual rights of contribution and indemnity'" (Pet. App. 82a, quoting *McKellar* v. *Clark Equipment Co.*, 472 A.2d 411, 416 (1984)). In *Roberts* v. *American Chain & Cable Co.*, 259

hypothetical analogy, which ignores the exclusivity provision of the FECA because the FECA does not apply to private parties and ignores the exclusivity provisions of the MWCA and the LHWCA because those Acts apply only to private parties, is clearly inappropriate.[13] It would expose the United States to greater liability than any similarly situated private party.

2. Petitioners Raymark and Eagle-Picher assert that the court of appeals erred in dismissing their third-party actions against the United States in its capacity as vessel owner. Eagle-Picher contends that the court of appeals erred in concluding that Section 905(b) of the LHWCA applies only to maritime torts. Raymark appears to agree with Eagle-Picher, but primarily argues that the court of appeals erred in its application of the maritime nexus test enunciated in *Executive Jet*.

a. As an initial matter, we think that the court of appeals (while reaching the correct result) ana-

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A.2d 43, 49 (1969), the Maine Supreme Judicial Court held that the exclusivity provision of the MWCA exempts an employer "from any duty of contribution to a third-party tortfeasor whose concurrent negligence with that of the employer has caused the accident." The court added that along with barring the impleading of an employer by a third-party tortfeasor for contribution, the MWCA "equally precludes such procedures on the ground of indemnification upon the so-called quasi contract theory or implied-promise-in-law basis" (*id.* at 51).

[13] Other courts have ruled that where the law applicable to private parties bars third-party tort recovery against those immune to suit by underlying plaintiffs, FTCA third-party actions against the government based on injuries to FECA-covered workers must be dismissed. See, *e.g.*, *Prather* v. *Upjohn Co.*, 585 F. Supp. 112, 113-114 (N.D. Fla. 1984) (contribution barred by both Florida Contribution Among Tortfeasors Act and Florida Workmen's Compensation Act).

lyzed this issue in an unnecessarily complicated manner by deciding to "bracket [its] FTCA-based concerns" and to "assume for the purposes of [its] analysis that defendants seek to maintain a third-party contribution and indemnity action against a private shipyard which owns the ships on which the plaintiffs worked" (Pet. App. 12a). In so doing the court of appeals adopted an inappropriate analogy. Although a private shipyard in Maine was subject to suit by its employees under Section 905(b) in its capacity as vessel owner prior to the amendment of Section 905(b) in 1984 to overrule *Jones & Laughlin* (see pages 20-21, *infra*), the United States was not subject to such direct suits. Section 8116(c) of the FECA bars suits by government employees who may receive workers' compensation payments against the United States. That provision bars direct suits against the United States in its capacity as vessel owner. *Patterson* v. *United States*, 359 U.S. 495, 496 (1959) (FECA bars suit by employee under Suits in Admiralty Act); *Johansen* v. *United States*, 343 U.S. 427, 436-440 (1952) (FECA bars suit by employee under Public Vessels Act). Therefore, the United States was not subject to direct suit under Section 905(b) by the plaintiffs in this case, as they recognized by not suing the United States. In our view, the appropriate analogy is not to a private employer subject to direct suit in its capacity as vessel owner under Section 905(b), but to an employer that is not subject to such suits, because immunity from direct suit is a relevant circumstance and the exclusivity provision of the FECA bars direct suit aginst the United States by its employees.[14]

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[14] The district court, like the court of appeals, employed an inappropriate analogy because it rejected our argument that the United States should be analogized to a private employer

As the court of appeals recognized, the governing substantive law applicable to this case requires that a third-party tort recovery may be secured only against a party that is potentially subject to tort liability to the plaintiffs.[15] Because there is no basis for a direct suit under Section 905(b) against the United States under the appropriate analogy since Section 8116(c) of the FECA bars such suits, there is no basis for a third-party suit against the United States either. That is so regardless of whether a private shipyard would be subject to such direct, and therefore to indirect, suits. Therefore, even if the court of appeals erred in concluding in *Drake* that Section 905(b) applies to maritime torts only, it reached the correct result in this case.

b. In any event, the court of appeals correctly held that Section 905(b) applies to maritime torts only. Petitioner Eagle-Picher (Pet. 15-16) notes that Section 905(b) does not expressly provide that it is a maritime tort provision. However, as the court of appeals observed, the history of Section 905(b) shows that Congress intended that provision to apply only to torts cognizable in admiralty. The common law of admiralty provided a negligence action that could be brought by shipyard workers (Pet. App. 70a). In *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946), the Court ruled that a longshoreman injured on a vessel lying in navigable waters could bring an "un-

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immune from direct suit by the FECA and instead concluded that the United States should be considered the same as any private shipyard employer in Maine (Pet. App. 25a). See note 5, *supra*.

[15] As we have explained (pages 11-12, *supra*), this Court's decision in *Lockheed* recognizes that there must be a basis for the third-party claim in the underlying substantive law.

seaworthiness" action, an absolute liability action previously limited to seamen. In 1972 Congress enacted Section 905(b) to return the law "to its pre-*Sieracki* state" (Pet. App. 70a). In overturning *Sieracki*, the court of appeals correctly concluded, Congress did not intend to enlarge the scope of the negligence action available under the common law of admiralty, but merely intended to reinstate it.[16] Accordingly, the court of appeals held, the asbestos manufacturers would have a substantive basis for their third-party claims against the private shipyard in *Drake* in its capacity as vessel owner only if the plaintiffs' claims against the shipyard would have satisfied the requirements for admiralty jurisdiction set out in *Executive Jet*.

The court of appeals recognized that "there are cases which have either ignored or overlooked the *Executive Jet* nexus test in determining whether a tort was cognizable under Section 905(b)" (Pet. App. 76a-77a). Petitioners cite *Hall* v. *Hvide Hull No. 3*, 746 F.2d 294 (5th Cir. 1984), cert. denied, No. 84-1819 (Oct. 7, 1985), as presenting an express con-

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[16] The court below noted that other courts of appeals had agreed with that conclusion, citing *Holland* v. *Sea-Land Service, Inc.*, 655 F.2d 556, 559 (4th Cir. 1981), cert. denied, 455 U.S. 919 (1982) (Section 905(b) did not "enlarge the traditional jurisdiction of admiralty over maritime torts"); *Christoff* v. *Bergeron Industries, Inc.*, 748 F.2d 297, 298 (5th Cir. 1984) (Section 905(b) "neither extended the boundaries of traditional admiralty jurisdiction nor converted ordinary tort claims against vessels into federal questions independent of admiralty"); and *Harville* v. *Johns-Manville Products Corp.*, 731 F.2d 775, 787 n.9 (11th Cir. 1984) (Section 905(b), "rather than creating a new cause of action, merely preserves certain preexisting remedies to injured workers against third parties").

flict (85-1253 Pet. 17; 85-1288 Pet. 52). *Hall* involved three cases brought under Section 905(b) by shipyard workers who were injured while working on partially-constructed ships. The court of appeals in *Hall* considered claims raised by two of the three defendants that there was no basis for federal jurisdiction. Those two defendants argued that the Fifth Circuit had held in *Lowe* v. *Ingalls Shipbuilding, Inc.*, *supra*—one of the cases holding that suits involving shipyard workers injured by exposure to asbestos are not cognizable in admiralty—that shipbuilding is not a maritime activity and, since admiralty jurisdiction was "the sole jurisdictional basis relied upon" by two of the plaintiffs (746 F.2d at 296 n.2), their actions had to be dismissed. The court held that in determining whether admiralty jurisdiction existed for a Section 905(b) action, a court should not consider the maritime nexus test for admiralty jurisdiction enunciated in *Executive Jet* but instead should only apply a maritime situs test (746 F.2d at 303). Since the three plaintiffs in *Hall* were injured on partially-built ships that were floating on navigable waters, the court concluded that there was a proper basis for admiralty jurisdiction. The court suggested that en banc consideration might be warranted to determine whether admiralty jurisdiction exists for cases involving ship construction (746 F.2d at 301).

Review is not warranted to resolve any conflict between the decision in *Hall* and the First Circuit's decisions. The decision in *Hall* is not in conflict with the holding in *Drake* that Section 905(b) applies to maritime torts only, the holding that Eagle-Picher contends is wrong. In fact, the court of appeals in *Drake* stated that "[i]nsofar as the *Hall* panel held that only maritime torts are cognizable under § 905 (b) we are in agreement" (Pet. App. 79a). The

disagreement the First Circuit expressed with the decision in *Hall* was with its peculiar statement that the maritime nexus test applied in *Executive Jet* does not apply in determining whether there is admiralty jurisdiction to hear a Section 905(b) claim, a view for which there is no basis "in law, logic, legislative history, or policy" (Pet. App. 79a).

Moreover, the result in *Hall* and the result in this case may be reconcilable. The court in *Hall* appeared to think that all injuries on ships under construction must be treated the same in terms of whether they have a maritime nexus. But that is not so. The essence of the holdings in cases such as *Drake* and *Lowe* is that asbestos cases do not have a maritime nexus because they are part of a land-based problem normally decided under state law principles, not that all injuries on ships under construction do not have a maritime nexus. See note 21, *infra*. The particular injuries at issue in the cases in *Hall*—which the court did not describe—may have had a relationship to traditional maritime concerns. The Fifth Circuit may have declined to review *Hall* en banc (746 F.2d at 294), despite the panel's suggestion that rehearing was appropriate (*id.* at 301), because it concluded that the injuries at issue, unlike the injuries at issue in asbestos cases, had a maritime nexus.[17]

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[17] The panel in *Hall* itself suggested that the cases before it were distinguishable from asbestos cases. The court stated that asbestos cases "involve the delicate question whether the federal interest in an amphibious worker's personal injury claims is sufficiently strong to justify federal courts supplanting state law with the federal common law of admiralty," a question that "is not relevant to the present facts" (746 F.2d at 302 n.16).

Nor, contrary to Raymark (Pet. 53), is any conflict presented by *Lundy* v. *Litton Systems, Inc.*, 624 F.2d 590 (5th

Review at this time is especially unwarranted because district courts in the Third and the Ninth Circuits have recently held that the United States is subject to third-party actions brought by asbestos manufacturers in its capacity as vessel owner. *Johns-Manville Sales Corp.* v. *United States*, 622 F. Supp. 443, 454 (N.D. Cal. 1985); Pet. App. 132a; *In re All Asbestos Cases*, 603 F. Supp. at 605-606; *Colombo*, 601 F. Supp. at 1132-1138. Those courts did not consider the analysis followed by the First Circuit in this case, as the First Circuit noted (Pet. App. 14a & n.9). The United States has recently sought reconsideration in those courts on the basis of the First Circuit's decision in this case and has requested permission to pursue interlocutory appeals in the alternative. It may be that all the circuits will agree with the First Circuit that the United States is not subject to such suits, in which case there will be no need for review by this Court.[18] If a conflict in the circuits develops, on the other hand, the Court may consider the issue at that time, when the nature of any conflict is certain to be more clear than is the nature of the disagreement between the First and the Fifth Circuits.

Another factor also makes review of this issue unwarranted at this time. Congress amended Section 905(b) in 1984 to overrule *Jones & Laughlin*. Sec-

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Cir. 1980), or *McCarthy* v. *The Bark Peking*, 716 F.2d 130 (2d Cir. 1983), cert. denied, 465 U.S. 1078 (1984). In those cases, the courts only decided whether the plaintiffs were covered by the LHWCA at all, not whether the alleged torts were maritime torts. See Pet. App. 76a-77a nn.9, 10.

[18] Even if another circuit disagrees with the First Circuit's conclusion that Section 905(b) applies to maritime torts only, that circuit might well order dismissal of third-party actions against the United States on the alternative ground that the First Circuit did not reach. See pages 14-16, *supra*.

tion 905(b) now clearly provides that a shipyard employer is not subject to direct suit or to third-party actions under that provision in any capacity, including its capacity as vessel owner.[19] Although the amended statute does not govern these or other pending asbestos cases because it applies only in cases where injuries manifested themselves after the statute was amended (see Pub. L. No. 98-426 § 28(c), 98 Stat. 1655), the fact that the statute has been amended diminishes the need for review, particularly in the absence of a clear conflict. There may well never be a need for this Court to consider whether Section 905(b) prior to its amendment authorized a third-party suit against the United States in its capacity as vessel owner.[20]

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[19] Congress in 1984 added a sentence to Section 905(b) providing that if an injured "person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was owner * * * of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer)" (Pub. L. No. 98-426, § 5(b), 98 Stat. 1641).

[20] In addition to alleging that review is warranted because of a conflict between the First Circuit's decisions and the decision in *Hall*, Eagle-Picher (Pet. 19-20) argues that the First Circuit's decisions conflict with *Director, OWCP* v. *Perini North River Associates*, 459 U.S. 297 (1983), and *Perkins* v. *Marine Terminals Corp.*, 673 F.2d 1097 (9th Cir. 1982). However, neither of those cases involved a tort suit. Rather, the issue presented in those cases was whether certain employees were covered by the LHWCA for purposes of receiving workers' compensation. The court of appeals recognized in *Drake* that "*Perini* was concerned solely with *compensation*, not with maritime tort jurisdiction, and these two boundaries have for a long time been quite distinct" (Pet. App. 79a (emphasis in original)). The Fifth and Ninth

c. Petitioner Raymark errs in contending (Pet. 41-57) that the court of appeals misapplied the nexus test enunciated in *Executive Jet*. As the court below noted (Pet. App. 73a-74a), six circuits have concluded that shipyard workers may not sue asbestos manufacturers in admiralty. Those decisions are correct, as Raymark acknowledges (Pet. 44-45).[21] As

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Circuits have also explicitly recognized that "maritime employment" status under Section 902(3) for workers' compensation purposes is not the same as "maritime nexus" for determining admiralty jurisdiction over a tort action. See *Rohde* v. *Southeastern Drilling Co., Inc.*, 667 F.2d 1215, 1218-1219 (5th Cir. 1982); *Thibodaux* v. *Atlantic Richfield Co.*, 580 F.2d 841, 846 n.14 (5th Cir. 1978), cert. denied, 442 U.S. 909 (1979); *Ramos* v. *Universal Dredging Corp.*, 653 F.2d 1353, 1359 (9th Cir. 1981). Therefore, *Perini* does not control the decision in this case and the First Circuit's decisions are not in conflict with *Perkins*.

[21] In *Harville*, the Eleventh Circuit summarized the reasons why suits based on injury resulting from exposure to asbestos do not have a sufficient relationship with admiralty concerns to satisfy the maritime nexus test. The court explained that "[a]dmiralty's purposes are various but limited. In *Executive Jet* the Supreme Court described admiralty as dealing with navigational rules, apportionment of liability for maritime disasters, protection of seamen aboard ship, and establishment of uniform rules for maritime liens, captures of prizes, liability for cargo damage, and claims for salvage. 409 U.S. at 269-70. The Court has also stated that 'the primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce.' *Foremost Insurance*, 457 U.S. at 674." 731 F.2d at 786 (citation omitted). Asbestos cases are not concerned with such matters, the court continued: "We can foresee no way in which a result in this case in favor of either the land-based shipyard workers or the asbestos manufacturing defendants will have any more than the most attenuated impact on maritime commerce. None of the issues that the Supreme Court listed in *Executive Jet* are involved. Rather, the issues that this litigation presents are identical to

the court of appeals concluded (Pet. App. 76a), if the asbestos-related injuries of shipyard workers are not maritime torts when injured workers sue asbestos manufacturers, they do not become maritime torts merely because a party is sued in its capacity as vessel owner.

Raymark contends to the contrary, insisting that the "need for uniformity" in the treatment of vessel owners (Pet. 47) warrants the conclusion that "vessel owner negligence gives rise to a maritime tort" in every case (*id.* at 46). But the presence of a vessel owner as a party does not by itself require a finding of maritime nexus. See *Sohyde Drilling & Marine Co.* v. *Coastal States Gas Producing Co.*, 644 F.2d 1132 (5th Cir.), cert. denied, 454 U.S. 1081 (1981); *West* v. *Chevron U.S.A., Inc.*, 615 F. Supp. 377 (E.D. La. 1985). The court of appeals recogized that, because it focused on the *cause* of the injury suffered by a shipyard worker (Pet. App. 75a n.8), workers injured on a vessel might have different bases for their negligence actions depending on whether the cause of the injury suffered had a maritime nexus, such as an injury caused by a defective winch, or whether the cause of the injury was essentially land-based, as is the case with injuries caused by exposure to asbestos. This would lead to different treatment of vessel owners depending on the cause of injuries. However, as the court of appeals stated: " 'Whatever anomalous results may follow from distinguishing between harbor workers according to the maritime

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those presented in countless other asbestos suits; they involve questions of tort law traditionally committed to local resolution." *Ibid.*

nature of the hazards they encounter are at least offset, if not outweighed, by the anomalous results of treating construction workers injured by asbestos poisoning differently depending on whether they were installing asbestos in a ship or in an office building overlooking the harbor. *The state has an interest in providing uniform treatment to these two like workers.*' " Pet. App. 15a (citation omitted; emphasis in original), quoting *Austin*, 705 F.2d at 13.[22] Raymark has not explained why the need for uniform treatment of vessel owners outweighs the interests favoring uniform treatment of asbestos workers.[23] Because the courts of appeals are in agreement that injuries resulting from exposure to asbestos are not admiralty concerns, but are properly decided according to state

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[22] The court of appeals observed, in denying rehearing in this case, that while petitioners' concern that there be a uniform standard governing a vessel's duty to warn of hidden dangers aboard ship was a factor to consider in determining whether there was a maritime nexus, the need for uniformity favored a finding of no maritime nexus in these cases. The court noted that "[i]f Drake ha[d] sued [Bath Iron Works] (BIW) as *pro hac vice* vessel owner for failure to warn or protect against a dangerous condition, the questions would have been whether working with asbestos was dangerous and whether BIW knew or should have known of it. These are the same questions that would arise if Drake had worked with asbestos, without warning or protection, on a ship not owned by BIW, or in one of BIW's warehouses on land." Pet. App. 91a.

[23] Because the court of appeals recognized that its holding that the injuries involved in this case are not maritime torts depended on the cause of the injuries, the cases cited by Raymark (Pet. 54-55 n.15) are not in conflict with the decision here. The injuries in those cases were not clearly related to land-based problems, but rather were intrinsic to the condition of a vessel.

law, there is no merit to Raymark's contention that this Court should review the First Circuit's application of the maritime nexus test in this case.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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No. 85-1253

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

EAGLE-PICHER INDUSTRIES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

THE GOVERNMENT HAS MISCHARACTERIZED BOTH THE NATURE OF THIS CONTROVERSY AND THE NATURE OF EAGLE-PICHER'S CLAIMS.

The Government's brief in opposition to Eagle-Picher's petition for certiorari, like the decision which it seeks to defend, is founded upon mischaracterizations of the nature of this case and of Eagle-Picher's claims.[1] Lest this Court be misled by the Government's efforts here, several basic points need to be emphasized.

1. Section 905(b) of the Longshoremen's and Harbor Workers' Act, 33 U.S.C. § 905(b) (1982), authorizes suit by an LHWCA-covered employee against a vessel owner for injuries caused by the vessel owner's breach of certain duties of care imposed by federal maritime law. *See Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 163 n.10, 165-67 & n.13 (1981); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 629-32 (1959).

Among other things, federal maritime law requires a vessel owner (i) to maintain his ship in a reasonably safe condition; (ii) to avoid exposing persons aboard the ship to hazards presented by areas or equipment within the control of the vessel owner; and (iii) to warn persons aboard the ship of any hidden dangers of which the vessel owner is aware. *Scindia Steam Navigation Co. v. De Los Santos*, *supra*, 451 U.S. at 167. A vessel owner's breach of any of those duties—which are precisely the duties that the United States is alleged here to have breached[2]—constitutes a "maritime tort." Such a breach,

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[1] The United States has filed a single, consolidated brief in opposition to the petitions for certiorari submitted (i) by Eagle-Picher in the instant proceeding and (ii) by Raymark Industries, Inc. and seven other parties in No. 85-1288. Both petitions seek review of the decision of the Court of Appeals for the First Circuit reported at 772 F.2d 1023. (Appendix, at 1a-17a.) A third, related petition for certiorari, currently pending before the Court in *Drake v. Raymark Industries, Inc.*, No. 85-1246, presents the same issue for review.

[2] It has been alleged here that the United States, owner of the vessels upon which the underlying plaintiffs were required to work,

when it causes injury to a maritime worker covered by the LHWCA, is actionable under Section 905(b).[3]

An LHWCA worker's negligence action against a vessel owner under Section 905(b)—so long as it satisfies the Act's "situs" and "status" tests and alleges the breach of federal maritime vessel-owner duties—*does*, by nature and definition, involve an actionable "maritime tort"—and the Government's repeated contention that Section 905(b) applies only to "maritime torts" (Brief . . . in Opposition, at 8-9, 14, 16, 20 nn.17-18) is simply a distractive red herring.

2. The issue presented here is *not* whether the torts allegedly committed by the United States are "maritime torts." The issue here, rather, is whether a Section 905(b) plaintiff—*in addition* to being an "employee" "engaged in maritime employment" and "covered" by the LHWCA—and *in addition* to having suffered shipboard injury caused by the vessel owner's breach of federal maritime duties—must also satisfy extra-statutory criteria which relate only to the question of whether a dis-

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(i) knowingly maintained unsafe conditions upon those ships by requiring the inclusion of asbestos in all insulation products used aboard the ships; (ii) negligently failed to implement known and available protective measures for the control of airborne asbestos dust, thereby constantly exposing those workers to unsafe concentrations of such dust; and (iii) failed to warn those workers of the extreme danger to which they were being exposed in the course of their maritime employment. *See, e.g.*, Appendix, at 49a.

[3] Ironically, the court below itself paid lip service to the fact that "negligence actions that are brought against the shipowner pursuant to § 905(b) are governed by federal maritime principles." *In re All Maine Asbestos Litigation (PNS Cases)*, 772 F.2d 1023, 1029 (1st Cir. 1985) (Appendix, at 11a), *citing and paraphrasing Scindia Steam Navigation Co. v. De Los Santos, supra.*

Having said that, however, the court of appeals went on (i) to ignore the fact that the United States *is* alleged here to have committed federal maritime torts; (ii) to mischaracterize the claims involved here as garden-variety land-based product-liability claims; and (iii) to confuse substantive maritime law with subject-matter jurisdiction (*see* page 5 & n.5 *infra*). *See generally* Petition for Certiorari, at 8-11 & n.16.

trict court may exercise general admiralty subject-matter jurisdiction under 28 U.S.C. § 1333(1).

The Court of Appeals for the First Circuit itself recognized that its decision to superimpose the jurisdictional "nexus" requirement of *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), upon the express terms of the LHWCA conflicts directly with the decisions of at least two other courts of appeals. *See Drake v. Raymark Industries, Inc.*, 772 F.2d 1007, 1016-17 (1st Cir. 1975), *petition for cert. pending*, No. 85-1246 (filed Jan. 21, 1986).

The conflict between the decision below and *Hall v. Hvide Hull No. 3*, 746 F.2d 294 (5th Cir. 1984), *cert. denied sub nom. Avondale Shipyards v. Rosetti*, 54 U.S.L.W. 3212 (U.S. Oct. 7, 1985), and *McCarthy v. The Bark Peking*, 676 F.2d 42 (2d Cir. 1982), *vacated and remanded*, 459 U.S. 1166 (1983), *on remand*, 716 F.2d 130 (2d Cir. 1983), *cert. denied*, —— U.S. ——, 104 S. Ct. 1439 (1984), is indeed real and substantial, and can be resolved only by this Court.[4]

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[4] The Government effectively admits the conflict with *Hall*. (*See* Brief . . . in Opposition, at 19.) Its treatment of *The Bark Peking*—suggesting that that case dealt with LHWCA coverage only for purposes of workers' compensation and not for purposes of Section 905(b) (*id.* at 20 n.17)—is misleading, to say the least.

In *The Bark Peking*, the Court of Appeals for the Second Circuit clearly recognized that *the availability of the Section 905(b) vessel-owner remedy* is *coextensive with coverage* under the LHWCA.

In *The Bark Peking*, a worker injured while painting the mast of a museum ship brought an action, under Section 905(b), against the owner of the ship. The court of appeals recognized that any person covered by the Act (*i.e.*, "engaged in maritime employment") is entitled to maintain such an action under Section 905(b) (676 F.2d at 45); but it ruled initially that the plaintiff could not be deemed "covered" by the LHWCA because he failed to satisfy the LHWCA's own "status" test, since his work "bore no significant relationship to navigation or commerce on navigable waters" (*id.* at 45-46, *citing, inter alia, Executive Jet Aviation, Inc. v. City of Cleveland, supra*). This Court granted certiorari, and summarily vacated the judgment of the court of appeals, remanding the case for further proceedings in light of the then-recently decided *Direc-*

3. The Government's effort to reconcile the decision below with *Director, Office of Workers' Compensation Programs v. Perini North River Associates*, 459 U.S. 297 (1983), and *Perkins v. Marine Terminals Corp.*, 673 F.2d 1097 (9th Cir. 1983), begs the very issue presented by Eagle-Picher's petition.

Perini and *Perkins* both stand squarely for the proposition that *coverage* under the LHWCA is to be determined *without* reference to the *Executive Jet* "nexus" test. Again, the Government suggests that those cases deal only with the issue of LHWCA coverage "for purposes of receiving workers compensation" and not with the availability of a Section 905(b) action. (Brief . . . in Opposition, at 20 n.17). In so arguing, the Government purposefully ignores the fact that the statute expressly makes the Section 905(b) remedy available to *any* person "*covered*" by the Act. The statute clearly defines coverage *once* and for *all* purposes (*see* 33 U.S.C. § 903(a)); it simply does not admit of two, separate definitions of "coverage."

Consistent with the express terms of the statute (and its legislative history), at least two courts of appeals have ruled that the availability of the Section 905(b) remedy is *coextensive with coverage under the statute. See Hall v. Hvide Hull No. 3, supra*, 746 F.2d at 302-03; *McCarthy v. The Bark Peking, supra*, 716 F.2d at 132. *Perini* and *Perkins*, like *Hall* and *The Bark Peking*, hold that *coverage* under the statute—for *any* purpose—is to be determined *without* reference to the general admiralty jurisdictional criteria articulated by this Court in an entirely different context in *Executive Jet*.

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tor, Office of Workers' Compensation Programs v. Perini North River Associates, 459 U.S. 297 (1983). *See* 459 U.S. at 1166.

On remand—and on the basis of this Court's ruling in *Perini*—the Court of Appeals for the Second Circuit ruled that the plaintiff was, indeed, " a covered employer under the LHWCA," "engaged in 'maritime employment' " under Section 902(3), *and therefore entitled to "bring his action for damages under 33 U.S.C. § 905(b)."* 716 F.2d at 132 (emphasis added).

4. Finally, the Government repeatedly ignores the difference between the substantive law of maritime vessel-owner torts—as embodied in Section 905(b) of the LHWCA (making the tort actionable), in *Scindia Steam Navigation Co. v. De Los Santos, supra* (defining the vessel owner's duties), and in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974) (allowing contribution in non-collision maritime cases)—and those separate and distinct principles which govern general admiralty subject-matter jurisdiction under 28 U.S.C. § 1333 (1). Section 1333(1) is simply not involved here,[5] and the jurisdictional principles articulated by this Court in its construction of that statute in *Executive Jet* are not implicated.[6]

THE GOVERNMENT'S NEW FECA-BASED ARGUMENT IS WITHOUT MERIT, BUT HIGHLIGHTS THE NEED FOR REVIEW BY THIS COURT.

It is damningly ironic—but hardly surprising in light of the vulnerability of the decision below—that the first argument advanced by the Government in opposition to Eagle-Picher's petition is that the court of appeals reached the right result for the wrong reason. (Brief . . . in Opposition, at 14-15.)

Characterizing the reasoning of the court of appeals as "inappropriate" and "unnecessarily complicated" (*id.*

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[5] Subject-matter jurisdiction over the federal cause of action authorized by 33 U.S.C. § 905(b) is vested in the district courts by 28 U.S.C. § 1331. *Rex v. Cia. Pervana de Vapores, S.A.*, 493 F. Supp. 459, 467 (E.D. Pa. 1980), *rev'd on other grounds*, 660 F.2d 61 (3d Cir. 1981), *cert. denied*, 456 U.S. 926 (1982) ("An action arises under the laws of the United States if the complaint seeks a remedy expressly granted by federal law or if it requires the construction of federal legal principles for its disposition. . . . There can be no doubt that an action under § 905(b) of the LHWCA meets all of these requirements."), *citing, inter alia, Griffith v. Wheeling-Pittsburgh Steel Corp.*, 610 F.2d 116 (3d Cir. 1979).

[6] The Government has failed entirely to address the fact that *Executive Jet*, by its very terms, is limited to jurisdictionally ambiguous situations "in the absence of legislation to the contrary." 409 U.S. at 274. *See* Petition for Certiorari, at 21.

at 15), the Government argues that Eagle-Picher's vessel-owner claims should have been dismissed on the basis of the following dicta in the decision below:

> We doubt whether we can ignore an express congressional exclusion of federal workers from coverage under the LHWCA, and employ an FTCA analogy by which coverage can be analogically presumed so as to render the United States vulnerable to a shipowner negligence suit. . . . Where a provision of the FTCA excludes what would otherwise be a potential cause of action, no action against the government is permitted. . . . Moreover, where other federal policies, express or implied, preclude what would otherwise be a potential cause of action, no action against the government may stand. . . . But we shall bracket these FTCA-based concerns. . . .

772 F.2d at 1029-30 (Appendix, at 11a-13a).

There is absolutely no authority whatsoever for the proposition that any "implied" or unstated "federal policies" may be invoked to defeat the FTCA's express mandate that the United States be held accountable in tort "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. Nor do any of the cases cited by the court of appeals in the course of its dicta or by the Government in its brief in opposition here provide any authority for the assertion of such a proposition.

To the contrary, Congress carefully and expressly identified those situations in which the United States is *not* to be held liable in tort as if it were a private party; *all* such exceptions are carefully delineated in the statute. *See* 28 U.S.C. §§ 2671, 2680(a)-(g). Three of the cases cited by the First Circuit involved such express exceptions: (i) *United States v. Orleans*, 425 U.S. 807, 813-14 (1976) (independent contractors excluded from the definition of "Federal agency" under 28 U.S.C. § 2671); (ii) *Dalehite v. United States*, 346 U.S. 15, 30-31 (1953) ("discretionary function" exception under 28 U.S.C. § 2680(a)); and (iii) *United States v. S.A. Empresa de*

Viacao Aerea Rio Grandensa (Varig Airlines), —— U.S. ——, 104 S. Ct. 1755, 1762 (1984) (same).

Nor does *Laird v. Nelms*, 406 U.S. 797, 802-03 (1972), support the suggestion that a valid FTCA claim may be summarily defeated by the invocation of "other federal policies, express or implied." To the contrary, *Laird v. Nelms* involved a straightforward issue of statutory construction—*viz.*, whether Congress intended, by its use of the phrase "negligent or wrongful act or omission," to subject the United States to strict-liability claims. This Court ruled, simply, that it did not.[7]

Finally, neither *Johansen v. United States*, 343 U.S. 427 (1952), nor *Patterson v. United States*, 359 U.S. 495 (1959), supports the Government's position here. *Johansen* and *Patterson* hold, simply, that a FECA-covered federal employee may not sue the United States directly under the Public Vessels Act or the Suits in Admiralty Act. Neither involved claims under the FTCA, and neither even remotely suggests that any unstated "policy" considerations may be invoked to defeat the plain language of the FTCA. Under the FTCA, the United States is to be treated *as if it were a private party*—here, a private shipyard/vessel-owner—and:

> Such a private shipyard would not be protected by the *Johansen/Patterson* doctrine, because the shipyard would not be covered by the FECA.

In re All Maine Asbestos Litigation, 589 F. Supp. 1571, 1576 (D. Me. 1984) (Appendix, at 25a). *Every* court to

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[7] Similarly, *Feres v. United States*, 340 U.S. 135 (1950), and *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977)—cited in a footnote to the decision below—also involved construction of the statutory language of the FTCA. In *Feres*, this Court ruled that, because of the uniqueness of the federal government's relationship to the Nation's armed forces, there exists no "private individual under like circumstances" within the meaning of the FTCA and, thus, no analogous private liability upon which to base FTCA liability for injuries to active-duty servicemen. 340 U.S. at 141-42. In *Stencel*, the Court simply extended its ruling in *Feres* to bar third-party actions involving injuries to active-duty servicemen for the same reason.

have addressed this "bracket[ed]" issue has so ruled. *See generally* Petition for Certiorari, at 7-8 n.14.[8]

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[8] The Government's criticism of both the district court and the court of appeals for adhering to the mandate of the FTCA and examining the liability of an analogous private shipyard/vessel-owner (Brief . . . in Opposition, at 14-16 & n.14) is not only unfounded but disingenuous as well.

The third-party complaint at issue here originally contained nine counts—seven of which asserted claims based on the common law of the State of Maine. *See* Petition for Certiorari, at 4 n.4. In seeking dismissal of those state-law claims, the Government argued successfully (i) that, under the FTCA, the liability of the United States must be determined by reference to the liability of a similarly situated private shipyard/vessel-owner; (ii) that, under Maine law, a private shipyard/vessel-owner is protected by the state workers' compensation statute from third-party state-law claims involving work-related injuries to its employees; (iii) that, even though the Federal Employees' Compensation Act ("FECA") does *not* prohibit such suits against the United States—*see Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983)—the United States must be treated under the FTCA *as if it were a private shipyard/vessel-owner*; and (iv) that to hold otherwise would make the United States the *only* shipyard/vessel-owner in Maine subject to such third-party suit in the circumstances presented here, thereby defeating the congressional purpose of the FTCA that the federal government be held liable "in the same manner and to the same extent as a private individual under like circumstances." *See In re All Maine Asbestos Litigation (PNS Cases)*, *supra*, 589 F. Supp. at 1574 (Appendix, at 22a-23a). *At the Government's urging*, the court of appeals upheld the dismissal of those state-law claims for precisely the same reason. *See* 772 F.2d at 1028-29 (Appendix, at 9a-10a).

The very same reasoning, of course, requires that Eagle-Picher's *federal vessel-owner claims* be upheld. *See* 589 F. Supp. at 1576 (Appendix, at 25a-26a). *See also Johns-Manville Sales Corp. v. United States*, 622 F. Supp. 443 (N.D. Cal. 1985); *In re All Asbestos Cases*, 603 F. Supp. 599 (D. Hawaii 1984); *Colombo v. Johns-Manville Corp.*, 601 F. Supp. 1119 (E.D. Pa. 1984); Petition for Certiorari, at 5-7 & nn.13-14. To hold otherwise—as the Government now argues (Brief . . . in Opposition, at 14-15 & n.14)—would make the United States the *only* shipyard/vessel-owner in Maine (or, for that matter, in the Nation) *not* subject to federal third-party suit in the circumstances presented here. Such a result, as the Government itself argued below, would be unfair—and destructive of the congressional purpose of holding the United States

THIS COURT SHOULD NOT POSTPONE REVIEW OF THE ISSUE PRESENTED HERE.

The significance of this case is not disputed by the Government. (*See* Brief . . . in Opposition, at 20-21.) Instead, the Government suggests that review "at this time" is "unwarranted" for two reasons. (*Id.* at 20.)

First, the Government acknowledges that three district courts (in addition to the district court below) have *upheld* vessel-owner claims identical to those presented here. *Id.* It notes, however, that it has sought reconsideration of those three decisions, and it expresses hope that, ultimately, "the circuits will agree with the First Circuit" and that the decision below will then be consistent with those future decisions of the Third and Ninth Circuits. *Id.*

Eagle-Picher submits that the decision below is *now* in direct conflict with *existing* law in the Fifth and Second Circuits (*see* pages 3-4 *supra*) and that that decision cannot *now* be honestly reconciled with this Court's decision in *Perini* or the Ninth Circuit's decision in *Perkins* (*see* page 4 *supra*).

Those conflicts exist *now*, and they warrant this Court's attention *now*. Future decisions such as those hypothesized by the Government will *not* end the confusion which the decision below has created. To the contrary, in the absence of guidance from this Court, such future decisions will either further complicate the matter (if they—or some of them—agree with the Government) or further isolate the First Circuit in its mistreatment of the LHWCA (if they follow the teaching of *Perini*, *Perkins*, *Hall* and *The Bark Peking*). Both prospects cry out for prompt and dispositive action by this Court.

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responsible "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674.

The alternative analysis now offered by the Government—"that the United States should be analogized to a private employer immune from direct suit by the FECA" (Brief . . . in Opposition, at 15-16 n.14)—is nonsensical; *no* private employer *anywhere* is immunized by FECA from direct suit under the LHWCA.

Finally, the Government argues that the 1984 amendments to the LHWCA—by which Congress overruled *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983), thereby prospectively precluding Section 905(b) actions where the negligent vessel owner is the injured worker's employer—somehow renders "review of this issue unwarranted at this time." (Brief . . . in Opposition, at 20.)

As noted in Eagle-Picher's petition herein, the 1984 LHWCA amendments have *no* effect whatsoever upon the tens of thousands of instances in which the United States, as a vessel owner, caused injuries that were manifested prior to the effective date of those amendments. Nor do they affect in any way the very common situation in which ship-owner negligence causes injury to an LHWCA-covered worker employed by someone other than the vessel owner itself.

Litigation will obviously continue to arise under Section 905(b), and, unless this Court acts *now* to provide guidance, the lower courts will continue to be faced with the conflicts discussed hereinabove. Review of the matter by this Court is most certainly warranted at this time.

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(5) (3)

Nos. 85-1253 and 85-1288

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v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES AND LAWS

THE PETITIONERS' THIRD-PARTY CLAIMS AGAINST THE UNITED STATES ARE CLEARLY VIABLE UNDER THE APPLICABLE SUBSTANTIVE LAW

In its Brief in Opposition the Government maintains that Petitioners have identified no substantive law basis for their third-party claims against the United States in its capacity as owner and operator of the shipyard at which the various plaintiffs worked. (Brief in Opp. at 11 through 12). The Government goes on to imply that this alleged failure of the Petitioners to establish a substantive basis for their claims was one reason for the lower courts holding dismissing those claims.

One is astounded to encounter such an argument at this stage of judicial proceedings. It is well settled in Maine law that an employer owes all employees the duty of furnishing a safe place to work and of warning employees of dangers

which may be encountered in the work place. Boober v. Bicknell, 135 Me. 153, 154, 191 A. 275-76 (1937); Kimball v. Clark, 133 Me. 263, 266, 177 A. 183, 184 (1935); and Hurd v. Hurd, 423 A. 2d 960, 962 (Me. 1981). If the employer breaches these duties he may be found liable for the injuries sustained by the employee under traditional principles of negligence law. Hurd v. Hurd, supra at 962 and n. 3. In the instant case the claims against the United States are based precisely on the breaches of these duties; specifically, the failure to eliminate the asbestos dust hazard at the Portsmouth Naval Shipyard or to warn the employees of the existence of this hazard.

Because Maine law clearly provides a substantive basis for tort claims against

employers for damages sustained by an employee, the question before the lower court was not whether the United States could be liable in negligence or under some other theory, but rather whether the United States as employer would have valid and complete defenses to the third-party claims for contribution and/or indemnity. Thus, the entire focus of the opinion below is whether the United States may assert as a defense to an admittedly viable claim the so-called employer immunity defenses of the Longshore and Harbor Workers' Compensation Act (LHWCA) and of the Maine Workers' Compensation Act (MWCA). The holding of the lower court is simply that these defenses are available to the United States and are, under the

circumstances, complete defenses.[1] There is no hint anywhere in the lower court's opinion that the third-party claims lack a basis in substantive law. Indeed it is the very viability of the claims that forced the lower court to rule on whether the workers' compensation defenses available under the LHWCA and the MWCA could be asserted against them by the United States.

The only substantive law issue even remotely related to the viability of Petitioners' third-party claims is the so-called joint liability requirement for a contribution claim against a third-party defendant. The argument advanced by the

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[1] The text of the holding is as follows:
"We hold that these land-based third-party claims are barred by § 4 of the Maine Workers' Compensation Act and 33 U.S.C. § 905(a)." (Pet. App. 22a).

Government below and again in its Brief in Opposition is that the United States cannot be liable on a contribution claim to a third-party plaintiff because it bears no liability directly to the plaintiff/employee under the Federal Employees' Compensation Act (FECA), 5 U.S.C. § 8116(c). (Brief in Opp. at 13 and n. 12) There is, however, no joint liability requirement for a contribution claim under Maine law. Bedell v. Reagan, 159 Me. 292, 192 A. 2d 24 (1963); and Otis Elevator Co. v. F. W. Cunningham & Sons, 454 A. 2d 335 (Me. 1983). Although the Government accepts, as it must, this rule of Maine law, it nonetheless claims that Petitioners mislead the court when they cite the pertinent cases. (Brief in Opp. at 13 and n. 12). With due respect, it is the Government who misleads when it asserts that joint liability is still

required under Maine Law when contribution is sought from an employer. (Brief in Opp. at 13 and n. 12).

The cases cited by the Government, McKellar v. Clark Equipment Co., 472 A. 2d 411 (Me. 1984); and Roberts v. American Chain & Cable Co., 259 A. 2d 43 (Me. 1969), do not address the law of contribution. These two cases focus exclusively on the meaning of 39 M.R.S.A. § 4, Maine's employer immunity statute, and the policy considerations supporting its enactment. In Maine contribution against an employer is not barred by reason of any joint liability requirement, and the state's highest court has explicitly so stated in explaining its decision in the Roberts Case: "Although this court did not allow contribution from an assenting employer, it did not base its decision on the

'common liability rule.'" Otis Elevator Co. v. F. W. Cunningham & Sons, supra at 338.

Under Maine law, contribution is barred by the employer immunity statute itself. Section 4, however, is vastly different from § 8116(c) of the FECA. This can be established by even a quick comparison of the text of the two statutes.

> An employer who has secured the payment of compensation in conformity with Sections 21-A to 27 is exempt from civil actions, either at common law or under Sections 141 to 148, Title 14, Sections 101 to 8118, and Title 18-A, Section 2-804, involving personal injuries sustained by an employee arising out of and in the course of his employment, or for deaths resulting from those injuries. 39 M.R.S.A. § 4.

> The liability of the United States...with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States ... to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United

> States ... because of the injury or death .... 5 U.S.C. § 8116(c).

Thus, under Maine law, the employer is simply exempt from all civil actions in any way related to the injury or death of an employee. Under § 8116(c), however, only the United States' liability to the employee or to his dependents is extinguished. Accordingly, this Court has always held that under the FECA the United States bears some liability for the injuries sustained by an employee when it is sued by someone other than the employee or one of his dependents. Weyerhaeuser S.S. Co. v. United States, 372 U.S. 597 (1963); and Lockheed Aircraft Corp. v. United States, 460 U.S. 190 (1983).

In summary, then, it is apparent that the Petitioners' third-party claims are valid under the substantive law of Maine. The issue for review is exactly

that as framed by the Petitioners - is the United States as employer entitled to assert an employer immunity defense other than that specifically provided to it by Congress in the FECA? If the United States is limited to its FECA immunity, then the lower court has erred in dismissing the third-party claims on the basis of the immunities found in the LHWCA and the MWCA.

The importance of resolving the issue framed by the Petitioners cannot be contested by the Government. Prior to this Court's decision in Lockheed there is not so much as a hint in any case that the nature and extent of the United States' immunity as employer is governed by compensation acts designed by state legislatures in response to local political pressures or by Congress in response to the particular needs of the

marine related industries subject to the LHWCA. The instant case is but one in a growing body of precedent wherein § 8116(c) is treated as meaningless or redundant on the very issue it addresses; namely, the immunity of the United States as employer for injuries sustained by one of its employees.

THE GOVERNMENT MISCONSTRUES THE EXECUTIVE JET "NEXUS" REQUIREMENT FOR ADMIRALITY JURISDICTION WHEN IT ASSERTS THAT THE INJURY SUSTAINED MUST BEAR SOME RELATIONSHIP TO TRADITIONAL ADMIRALTY CONCERNS

In its Brief in Opposition the Government repeatedly asserts that admiralty jurisdiction is inappropriate for the claims against the United States as vessel owner because there is a need for uniform treatment of all victims of asbestos-related disease. (Brief in Opp. at 23 through 25) This disingenuous proposition finds no support in any case

discussing the scope or purposes of admiralty jurisdiction and little support in the lower court's decisions. It is tantamount to claiming that the victims of falling cargo during the unloading of a ship should have no access to maritime remedies because other workers injured by falling cargo from a railroad car cannot bring a maritime cause of action.

The lower court acknowledged that there is nothing about asbestos-related diseases per se that renders a case involving these diseases non-maritime. (Pet. App. 92a n. 8). In short, in the eyes of the lower court, the type of injury sustained is of no moment. Contrary to the Government's suggestion the law quite properly treats a broken leg caused in a ship collision differently from a broken leg caused in an automobile collision, and the

occupation of the injured person would make no difference. By the same token, the law should treat asbestos-related diseases caused by vessel owner negligence during the construction or overhaul of a ship in navigable waters differently from the same diseases caused in building construction or renovation even though the nature of the injury sustained is the same. It is the identity of the victim, here a ship repairman, and the relationship of his activities to traditional maritime concerns and the identity of the tortfeasor, here a vessel owner, and the relationship of his activities to traditional maritime concerns that govern.

How asbestos-related diseases become "land-based problems ... [not] intrinsic to the condition of a vessel" (Brief in Opp. at 24 n. 23) as asserted by the

Government remains a mystery. It is no mere coincidence that the vast majority of asbestos cases filed in the District of Maine are brought by shipyard workers, a majority of whom worked at the Portsmouth Naval Shipyard. In these cases most of the workers' exposure to airborne asbestos dust occurred on board ship, and most of this shipboard exposure occurred during the removal or rip-out of asbestos products from the pipes, boilers, and machinery of the ships themselves. Thus, the causes of the asbestos diseases at issue are intimately connected to traditional maritime concerns and to the dangerous conditions of the vessels themselves.

The Government misconstrues the importance and unprecedented nature of the decision below in attempting to reduce the issue raised by the lower

court's decision to whether diseases resulting from asbestos exposure are "admiralty concerns" (Brief in Opp. at 24). Neither asbestos-related injuries nor any class of injuries are "admiralty concerns". Presumably, virtually any malady may befall a man or woman whether on land or at sea. Asbestos is simply the medical cause of the injury, and for analytical purposes it is indistinguishable from gases, toxic fumes, high-pressure steam, or any number of potentially harmful substances which, like asbestos, may be found on vessels in navigation and at industrial sites on land. What is an "admiralty concern", however, is a disease or injury that is caused by vessel owner negligence. Scindia Steam Navigation Co., Ltd. v. De Los Santos, 451 U.S. 156 (1981).

To ask, as the Government does, why

the conduct of the vessel owner in causing an asbestos-related injury should be judged by the standards set by maritime law is to question the very basis for the grant of admiralty jurisdiction to the federal courts. This Court has always stressed the need for national uniformity in laws affecting maritime affairs. Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972); and Foremost Insurance Co. v. Richardson, 457 U.S. 668 (1982). Uniformity means that no state can impose a greater duty of care on a vessel owner, such as strict liability for all shipboard injuries, to please local labor unions, or impose a lesser duty of care to lure more business to its ports for cargo operations, vessel construction, or vessel repair. As this Court noted in Scindia Steam Navigation Co., Ltd. v. De

Los Santos, supra, the duties of the vessel owner to maritime workers onboard are determined as a matter of federal, not state, law. Id. at 166 n. 13. There is no precedent for making exceptions to this rule on the basis of what type of injury the vessel owner's negligence caused. Were it otherwise the law maritime would vary from state to state and vary again depending on the type of injury sustained.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully Submitted,

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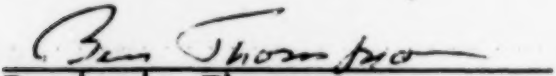

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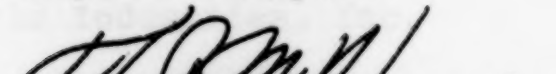

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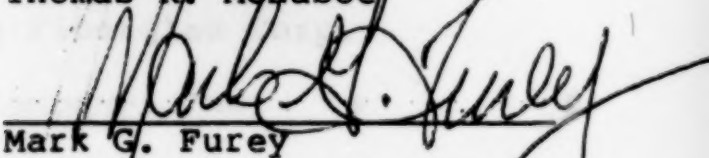

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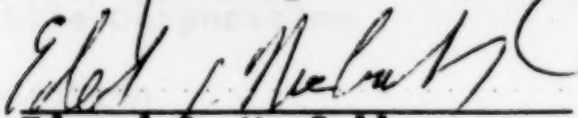

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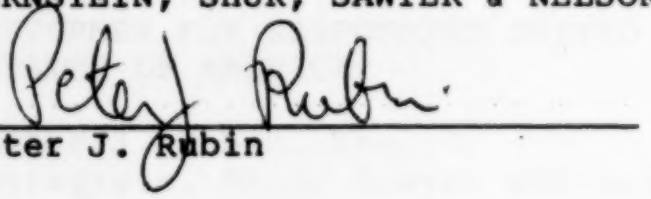

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CERTIFICATE OF SERVICE

I, Benjamin Thompson, Esq., certify that on the 5th day of May, 1986, I mailed, postage prepaid, forty (40) copies of the Petitioners' Reply To Brief In Opposition to the Clerk of the Supreme Court of the United States, One First Street, N.E., Washington, D.C. 20543, and mailed three (3) copies, postage prepaid, to each of the following counsel of record:

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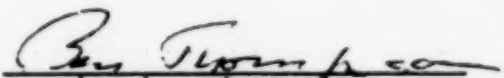

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SUPREME COURT OF THE UNITED STATES

RAYMARK INDUSTRIES, INC.
85–1246 *v.*
BATH IRON WORKS CORPORATION ET AL.

EAGLE-PICHER INDUSTRIES, INC.
85–1253 *v.*
UNITED STATES

RAYMARK INDUSTRIES, INC., ET AL.
85–1288 *v.*
UNITED STATES

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Nos. 85–1246, 85–1253 AND 85–1288. Decided May 19, 1986

The petitions for writs of certiorari are denied.

JUSTICE WHITE, dissenting.

In No. 85–1246, petitioner, an asbestos manufacturer, is the defendant in a products liability suit brought by the widow of a deceased employee of respondent's shipyard. Petitioner sought contribution from respondent on various theories, including a claim under § 905(b) of the Longshore and Harbor Workers' Compensation Act, 33 U. S. C. § 905(b). The United States Court of Appeals for the First Circuit held that § 905(b) covers only those torts that are within the reach of admiralty jurisdiction as defined in *Executive Jet Aviation Co.* v. *United States*, 409 U. S. 249 (1972). *Drake* v. *Raymark Industries*, 772 F. 2d 1007 (1985). The First Circuit concluded that ship construction does not satisfy the "maritime nexus" test of *Executive Jet*. As the First Circuit realized, its interpretation of the scope of § 905(b) conflicts with the decision in *Hall* v. *Hvide Hull No. 3*, 746 F. 2d 294 (CA5 1984), which holds that employees covered by the LHWCA who sue under § 905(b) need not satisfy the "mari-

time nexus" test of *Executive Jet* so long as the underlying event took place on a ship on navigable water.

In Nos. 85–1253 and 85–1288, which involve third-party claims by asbestos manufacturers against the United States as vessel owner and shipyard employer, the First Circuit followed its holding in *Drake*, *supra*, regarding the scope of § 905(b). *In re All Maine Asbestos Litigation (PNS Cases)*, 772 F. 2d 1023 (1985).

I would grant certiorari to resolve the conflict presented in these cases.